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JAY  
RY











REPORTS OF CASES  
argued and determined in the  
HIGH COURT OF CHANCERY

from the time of Lord Chancellor Eldon  
58 and 59 Geo. III.

[1818-1819]

S. SWEET

1821





JUL 23 1901

TABLE  
OF  
CASES REPORTED.

VOL. I. PART I.

	Page
<b>A</b> KHURST v. Jackson. ( <i>Bankruptcy of a partner to whom a premium had been agreed to be paid by his co-partners for good-will, no ground for relief in equity against payment of the premium.</i> )	47
Bailey v. Wright. ( <i>Construction of marriage settlement—husband not entitled under the description of next of kin or personal representative of his wife.</i> )	15
Battersbee v. Farington. ( <i>Voluntary settlement good against subsequent creditors.</i> )	88
Bell v. Free. ( <i>Surety for annuity not entitled to interest on his payments.</i> )	51
Carter v. Dean. ( <i>Cow-keeper not a trader within the bankrupt laws.</i> )	85
Cooper v. Thorpe. ( <i>Extinguishment of tithes by inclosure act.</i> )	55
Crawshay v. Collins. ( <i>The court will not order arbitrators to proceed.</i> )	31
Dunnage v. White. ( <i>Deed not carried into execution in equity, there being want of consideration and ignorance of rights.</i> )	67
Galland v. Leonard. ( <i>Construction of will.</i> )	129
Goldsmid v. Goldsmid. ( <i>Covenant in marriage articles to pay money to wife after husband's death, performed by distributive share of husband's personal estate.</i> )	140
Greenhouse, Ex parte. ( <i>Practice—Affidavits, and not depositions, admissible on a reference to the master, under 52 Geo. 3. c. 101.</i> )	18



## TABLE OF CASES REPORTED.

	Page
Hammond v. Neame. ( <i>Construction of will—bequest of dividends to one for maintenance of her children, a gift to herself, she having no children.</i> )	9
Hawes v. James. ( <i>Injunction to restrain sale by commissioners under an inclosure act.</i> )	2
Hill v. Smith. ( <i>Construction of will.</i> )	130
Houlditch v. Houlditch. ( <i>Practice—order of taxation requires revival where the solicitor dies before the report.</i> )	17
Jones v. Curry. ( <i>Execution of power—construction of will.</i> )	24
Mohun v. Mohun. ( <i>Will—uncertainty of terms.</i> )—	151
Morphett v. Jones. ( <i>Specific performance of parol agreement denied by the answer, on the evidence of one witness confirmed, and acts of part performance.</i> )	100
Nesbitt v. Meyer. ( <i>Specific performance refused of agreement for lease, the term being expired before the hearing.</i> )	97
Redfearn v. Sowerby. ( <i>Practice—Solicitor's lien for costs.</i> )	96
Skinner, <i>Ex parte</i> . ( <i>Petition, under the circumstances, held not within 52 Geo. 3. c. 101.</i> )	14
Wales, Princess of, v. Earl of Liverpool. ( <i>Practice—Order for production of instruments by plaintiff before answer.</i> )	113
Whitcombe v. Minchin. ( <i>Practice—Costs of notice of motion abandoned.</i> )	1
Wood v. Griffith. ( <i>Construction of award—Specific performance of award—Maintenance and champerty.</i> )	34

# CASES

IN

## CHANCERY.

WHITCOMBE v. MINCHIN.

December,  
1817

Jan. 16, 1818.

**T**HE defendant on the 10th *June*, 1817, gave the plaintiffs notice of a motion to be made before the Vice-Chancellor, that the defendant might be at liberty to put in a supplemental answer. On the 19th *June*, 1817, the motion was made before the then Vice-Chancellor (Sir Thomas Plumer), and an objection was made by his Honour, that the notice of motion did not specify the particular facts which the defendant proposed to introduce into his supplemental answer. No order was made on that motion, and the minute taken down by the register did not state the motion to have been either refused or adjourned, but was in these words: "Fresh notice must be given." On the 21st *June*, 1817, the defendant gave the plaintiffs notice of a motion to be made before the Lord Chancellor, for leave to put in a supplemental answer, specifying in the notice the several particulars proposed to be introduced into the supplemental answer. The defendant not having moved pursuant to the latter notice, a motion was now made on the part of the plaintiffs, that the defendant might be ordered to pay the costs of the two former notices of motion.

Where a defendant gave notice of a motion before the Vice-Chancellor, for leave to file a supplemental answer, and no order was made in consequence of the notice not stating the facts to be introduced into the supplemental answer, and the defendant thereupon gave a notice of a like motion before the Lord Chancellor, stating the facts meant to be introduced, and afterwards abandoned it, he was ordered to pay the plaintiff the costs of the two notices.

VCL J,

B

Mr.

1818.  
 WHITCOMBE  
 v.  
 MINCHIN.

Mr. *Hart* and Mr. *John Wilson* opposed the motion, referring to *Shelley v. Shelley* (a) *Anderson v. Palmer* (b) and the *Practical Register* (c), as establishing the rule that a party is at liberty to give and abandon three notices of motion without paying the costs: and they contended that in the present case there was in fact an abandonment of but one, a motion having been made pursuant to the first notice and in effect refused.

Sir *Samuel Romilly* and Mr. *Heald* in support of the motion, observed on the unreasonableness of the rule contended for, and distinguished the present case from those cited; the court having had possession of the motion, and having adjourned it merely for the purpose of giving more precise information to the plaintiffs, it was not competent to the defendant to abandon it.

The LORD CHANCELLOR on a subsequent day expressed his opinion that the plaintiffs were entitled to the costs of the two notices of motion, and made the order accordingly.

(a) 8 Ves. 316.

(b) 14 Ves. 151.

(c) Mr. *Wyatt's* ed. p. 487.

Jan. 16, 1818.

HAWES v. JAMES.

An inclosure act empowered commissioners to sell by private contract any part of the commonable lands fronting or adjoining the houses or gardens of the purchasers, and also empowered the commissioners to sell by auction such parts at the greatest distance from the houses of the respective proprietors, as the commissioners should think fit, for defraying the expences of the act, and the surplus of the produce of such sales was directed to be divided among the proprietors: On a bill by one proprietor on behalf of himself and the others, the commissioners were restrained by injunction from proceeding in an agreement made by them for the sale of a pond by private contract, to a person who was not the owner of any property adjoining or fronting the pond, it appearing that the pond was of much public utility and was sold at an undervalue.

THIS was a motion on the part of the plaintiff for an injunction "to restrain the defendants *James* and *Chapman* and the defendant *Simmonds* from all further proceedings in the transaction of the sale and purchase of the pond in the bill described, and the ground bordering thereon,

or from making or causing to be made any allotment or award thereof to the defendant *Simmonds* or any other person, or from delivering the exclusive possession thereof to the defendant *Simmonds* or any other person without the leave of the court." The motion was made *ex parte*, on a certificate of the filing of the bill, which was by the plaintiff "on behalf of himself and all other persons who being entitled or interested in any estates within the parish of *Twickenham*, were in that respect entitled to or interested in the residue of the waste lands directed to be inclosed by the act of parliament in the bill mentioned, and entitled to or interested in the surplus-money arising from the sale of lauds in the act mentioned; who should come in and contribute to the expence of the suit," and on an affidavit of the following facts :

1818.  
HAWES  
v.  
JAMES.

By act of parliament 53 G. 3. for inclosing lands in the parishes of *Isleworth*, *Heston*, and *Twickenham*, the defendants *James* and *Chapman* were appointed commissioners for dividing and allotting the lands thereby directed to be inclosed: and it was provided that it should be lawful for the commissioners to sell by private contract unto any person or persons any parcel or parcels of the commonable lands or grounds fronting or adjoining to his or their dwelling-house, gardens, or pleasure-grounds, and that the purchase-money of the lands so to be sold, should be paid to the commissioners: and the commissioners should apply the monies to arise by such sales towards defraying part of the expences of the act, but if any person so entitled to purchase the frontage to his or her dwelling-house, garden, or pleasure-ground, should refuse to take the same at the valuation of the commissioners, then it should be lawful for the commissioners to sell the same by public auction to the highest bidder at some of their meetings to be held in pursuance of the act of which public notice should be given by the commissioners in the newspaper called the *County Chronicle*, twenty-one days at least before such sales should be made: and

1818.

~  
HAWES  
v.  
JAMES.

that the lands to be sold by virtue of the act on payment of the full purchase-money for the same, should be allotted to the purchasers thereof by the award of the commissioners. And it was further enacted that the commissioners should make out an account of all the expences of applying for and obtaining the act, and of carrying it into execution, and that in order to raise a sufficient sum of money to defray all such expences, it should be lawful for the commissioners, and they were thereby authorized and required, as soon as might be after the making certain allotments therein referred to, and before making the division of the residue of the lands or before making any of the allotments, if the commissioners should think proper, on giving ten days' previous notice, to be published in the same manner as the notices of the meetings of the commissioners are by the act directed to be published, to sell *by public auction*, such part of the waste lands and grounds, and *at the greatest distance that conveniently might be from the respective messuages of the respective proprietors* of lands within the said parish, and in lots not exceeding 20 acres in each lot as they should deem sufficient for the purposes aforesaid, to any person or persons for the best prices that could be reasonably had or gotten for the same; and that the commissioners should apply the monies to arise by such sales in defraying all such costs, charges, and expences as aforesaid; and if any surplus of such monies arising from such sales should remain in the hands of the said commissioners after all such payments as aforesaid, such surplus should be distributed amongst and paid to the several persons interested in the intended division, allotment and inclosure. After some directions for allotments to the lords of the manor, and for certain public charities, it was further enacted that the commissioners should divide, set out, and allot the residue of the said waste lands, &c. unto and amongst the several persons who at the time of their making such division or allotment, should be entitled to the estates within such respective parishes, in proportion to their respective

pective rights, shares, interests, and proportions therein ; in the making of which last-mentioned division and allotment, as well as in the making all the aforesaid divisions and allotments of the aforesaid open and common field lands, &c. the commissioners were to have due regard to the quantity, quality, value, situation, and other circumstances of the said waste lands and grounds within the said parishes respectively, and also due regard to the situation of the respective houses or homesteads, or other estates of the several persons, owners or proprietors of houses and estates, within the said parishes respectively, so as to make all such allotments as equitable as possible, and as convenient to the said houses, messuages, cottages, &c. and inclosed property, and to the several owners and proprietors of such houses, &c. or persons entitled to the same respectively, as the respective situations of the same would admit : And that in case any surplus-money arising from the sale of any lands and grounds made by the said commissioners, should remain after all the costs, &c. attending the obtaining and passing and executing the act, should have been fully paid and satisfied, such surplus-moneys should be divided or apportioned between the proprietors of the lands and grounds thereby directed to be divided and inclosed, according to their several and respective interests therein. And that as soon as conveniently might be after the division and allotment of the said lands and grounds should have been made and completed, and before the expiration of five years from the passing of the act, the commissioners should form and draw up an award or awards in the manner prescribed by the general inclosure act (a). The bill also stated the 10th section of the general inclosure act, whereby it is enacted that such commissioners should set out and appoint such private roads, bridleways, footways, ditches, drains, watercourses, watering places, quarries, bridges, gates, stiles, mounds, fences, banks, bounds, and land-marks in, over, upon, and through or

1818.  
HAWES  
v.  
JAMES.

(a) 41 G. 3. c. 109.

by



1818.

HAWES

v.  
JAMES.

by the side of the allotments to be made and set out in pursuance of such act as he or they should think requisite.

The plaintiff was entitled to a dwelling-house, garden and pleasure ground, situate at *Twickenham Common*, within the parish of *Twickenham*, adjoining the waste grounds in *Twickenham*, mentioned in the act, and was entitled to a right of common on those waste grounds, and ever since the passing the act, the plaintiff had been and still was entitled to an allotment out of such waste lands, in common with other proprietors of estates entitled to such rights of common: and the plaintiff and the other proprietors in due time and manner according to the act, delivered in their respective claims for allotments, which claims were duly received and allowed by the commissioners. Among the persons who claimed such allotments, the defendant *Simmonds* was permitted by the commissioners to establish a claim to an allotment upon the waste grounds in respect of certain property belonging to him within the parish, and a portion of the waste ground had been accordingly allotted to him. The commissioners had inclosed or divided parts of the waste grounds in *Twickenham* according to the directions of the act, and had made allotments to various persons of parts thereof, in respect of frontage to their dwelling-houses and gardens or pleasure-grounds, and in various other respects had proceeded to carry the act into execution, but some of the waste ground yet remained uninclosed, and the commissioners had not yet made their award.

Upon the waste ground mentioned in the act, there was a large pond, which up to the present time had been open and uninclosed, and the inhabitants of houses upon the waste ground derived great advantage and convenience from suffering the pond to remain uninclosed. The pond in question adjoined on one side and was open to the public road leading from *Twickenham* to *Staines*, and the water was extremely  
pure

part and useful for family purposes, for watering of cattle, and for the use of laundresses and other persons, many of whom depended for their livelihood on the supply of water from the pond, which was of great use and consequence to the persons residing in the neighbourhood, and it would be a great privation and inconvenience in case any part of it should be inclosed, inasmuch as there was no constant supply of water in any quantity, or that was equally pure and useful, near the dwelling-houses of persons residing in that neighbourhood, except the said piece of water: and all persons residing in that neighbourhood, and particularly persons of the poorer class, cottagers and others who had rights of common on the waste ground in the parish of Twickenham, had been accustomed to resort thereto to fetch and use the water: and ever since the passing the act there had been a great and general wish on the part of persons having rights of common on the waste ground, that the pond should remain uninclosed and in common, which wish was well known to the commissioners, and the pond had hitherto been left open and uninclosed. The pond in question was opposite the house and garden of a person recently dead, and who at the time of her death was, and had for several years been a lunatic, and of whose person or estate no committee had been appointed, and neither she nor any person on her behalf, had ever claimed the pond or the ground beyond the same in front of her house as an allotment, or to purchase the same in respect of frontage. The commissioners had clandestinely and without any public notice, agreed to sell by private contract, under colour of the acts, or one of them, the pond in question or a large part thereof, with part of the adjoining land, to the defendant *Simmonds* for £10*l.* and intended to award or convey the same to him, although the pond or the ground adjoining was not so situate with respect to the property of the defendant *Simmonds* as to entitle him to purchase it, or to entitle the commissioners to sell it to him by private contract, inasmuch as neither the pond nor the lands bordering

1816.

HAWES

v.  
JAMES.

1818.  
 HAWES  
 v.  
 JAMES.

ing thereon were fronting or adjoining to any property belonging to the defendant *Simmonds*. And it further appeared that the price at which the commissioners agreed to sell the same to the defendant *Simmonds* was much less than the same was *bonâ fide* worth under the circumstances, and less than the same would sell for by auction; and that the utility of the pond, to the persons hitherto entitled to use the same, was so great, that if it were put up to auction, it would be purchased for general use, and the plaintiff himself had offered to give 20 per cent. more for it than the price agreed to be paid by the defendant *Simmonds* in case the same were put up to auction; and that it would be a great injury to the plaintiff and other owners of estates interested in the allotment of the residue of the waste lands within the parish of *Twickenham*, and in the surplus money to be divided and apportioned as provided by the act, in case the contract by the said commissioners at such inferior price or even at any price, should be carried into effect.

The defendants had not appeared.

Sir *Samuel Romilly* and Mr. *Wray* in support of the motion.

The LORD CHANCELLOR granted the injunction until answer or further order, on the terms of the plaintiff's immediately giving notice.

## HAMMOND v. NEAME.

ROLLS.

Jan. 29, 1818.

**T**HE question in this case arose on the construction of the will of *Austin Neame*, dated 4th *January*, 1812, whereby after appointing *Thomas Neame* the elder and *Thomas Neame* the younger executors, he bequeathed to *Richard Gibbs*, his executors, administrators and assigns, the sum of 3400*l.* part of the stock then standing in the testator's name in the three per cent. reduced annuities, upon trust that *Gibbs*, his executors, &c. should pay and apply the yearly interest and dividends thereof as the same should become due and payable, into the hands of the testator's niece, and his the said *Richard Gibbs'* daughter the plaintiff *Mary Hills Hammond*, "for and towards the maintenance, education, and bringing up of all and every the child and children of the said *Mary Hills Hammond*, until he, she, or they should attain the age of twenty-one years: And when and so soon as he, she, or they should have attained that age, then upon trust, that *Gibbs*, his executors, &c. should pay and transfer the said 3400*l.* three per cent. reduced annuities, unto and equally among all and every the child and children of the plaintiff *Mary Hills Hammond*, to be divided between them, share and share alike, and to their several and respective executors, administrators, and assigns; and in default of such issue, upon trust that *Gibbs*, his executors, &c. should transfer the 3400*l.* three per cent. reduced annuities, to the testator's nephews and nieces, the children of his brother *John Neame*, and the children of his brother *Thomas Neame* the elder, living at the decease of *Mary Hills Hammond*, and the child or children of such one or more of them as should be dead, equally to be divided between them. Provided always, and he thereby declared that the first half year's interest of the said 3400*l.* three per cent. reduced annuities, which should

A testator bequeathed stock to a trustee, in trust to apply the dividends as they became due, into the hands of the testator's niece *M.* for and towards the maintenance, education, and bringing up of all and every the child and children of *M.* until he, she, or they should attain the age of 21, and then upon trust to transfer the capital to them, and in default of such issue to the children of other persons living at *M.*'s death; and the will gave the first half year's dividends of the same stock to *T.* who was also his residuary legatee; held that *M.* although she had no child, was entitled to the dividends for her own benefit during her life, or until she should have a child who should attain 21.

become

1818.  
 HAMMOND  
 v.  
 NEAME,

become due next after the testator's decease, should go and he thereby bequeathed the same unto his nephew and residuary legatee, the defendant *Thomas Neame* the younger, his executors, administrators, and assigns."

*Mary Hills Hammond* had not any child at the date of the will, nor since ; and the present bill was filed by her and her husband against the executors and residuary legatee of the testator, against *Richard Gibbs* the legatee in trust, the children of *Thomas Neame* the elder and *John Neame*, and the Governor and Company of the *Bank of England*, praying that the trusts of the will might be performed, and that the plaintiff *Mary Hills Hammond* might be declared to be entitled to receive the dividends of the  $\$400\text{L}$ . three per cent. reduced annuities during her life, or until she should have a child who should attain the age of 21 years.

Mr. *Hart* and Mr. *Roupell* for the plaintiffs, contended that this was a beneficial bequest of the dividends of the  $\$400\text{L}$ . stock to the plaintiff Mrs. *Hammond*, and that it did not depend on the fact of her having any children, except that when she should have a child who should attain the age of 21 years, her interest would be divested and the capital belong to such child. It is insisted by the residuary legatee that this is a contingent bequest of the dividends to the mother, that it is not to take effect until she shall have children,; that she has no interest except in trust for her children, that the intermediate interest belongs to the residuary legatee. But it is impossible to give that construction to the bequest. This is not a direction to the executors to pay the interest, and which is to be acted upon only when the supposed contingency shall happen, but it is an immediate bequest to a legatee in trust, whereby it became instantly severed from the bulk of the testator's property, and the trustee acquired an immediate right to have it transferred to him. It is an immediate bequest in possession. Then follows a direction how he is to dispose of it : he is to pay it  
 over

over to the plaintiff. The purpose of appointing a trustee was, that it might be paid over to Mrs. *Hammond*, and that the power of her husband over the legacy might be excluded. The trustee is directed to pay it into her hands; this direction is coupled with an intimation of the purpose or reason which induced the testator to make the bequest; viz. that she might be enabled to maintain her children, but the testator could not have looked to the children as the objects of the bequest, for he knew that she had not any children at the date of the will. It was a bequest to his niece to the intent that she might without being subjected to the controul of her husband, be enabled to maintain her children, but it is a bounty to her, and a means to enable her to maintain them. There are many cases where legacies having been given for a special purpose, and the purpose having failed without the fault of the legatee, the legacies have been held to be absolute. Thus in *Barlow v. Grant* (a), where 30*l.* was given to an infant to bind him an apprentice, and the infant died before he attained a competent age to be placed out an apprentice, it was held by Lord Keeper *North* that the 30*l.* ought to go to the executor or administrator of the infant. So in *Nevill v. Nevill* (b), where a legacy was given to the eldest son of *J. N.* to be begotten, "for putting him forth either to law or merchandize," one of the objections to the claim of the legatee was that the legacy being given for a particular purpose, the legatee was not entitled until fit to be placed out, but the objection was disallowed, and the legacy decreed to be paid. And in *Barton v. Cooke* (c), where a testator directed that his executors should pay out of his personal estate 100*l.* for the board and education of *J. B.* until he should be fit to be put out apprentice, and that they should then pay 100*l.* with him as an apprentice fee; it appeared that *J. B.* had attained the age of 19 and had not been put out an apprentice; and Lord *Alvanley*

1818.  
  
 HAMMOND  
 v.  
 NEAME.

(a) 1 *Vern.* 255.

(b) 2 *Vern.* 451. *Mr. Raithby's ed.*

(c) 5 *Ves.* 461.

held



1818.  
  
 HAMMOND  
 v.  
 NEAME.


held that *J. B.* was entitled to the two sums of 100*l.* given for his board and education and as an apprentice fee. The form of the bequest over also affords an argument in favour of the plaintiffs. It provides that in default of such issue of the plaintiff *Mrs. Hammond*, the trustee shall assign and transfer "*the said sum of 3400*l.* three per cent. reduced annuities*" unto all the testator's nephews and nieces, without any direction that they should be entitled to the intermediate dividends, from which omission it may be inferred that he intended that the intervening dividends should belong to *Mrs. Hammond*. The residuary legatee is also excluded by the clause which expressly bequeaths to him the first half year's dividend arising from the 3400*l.* which shews a clear indication that the testator did not intend him to have the whole.

*Mr. Wingfield*, for the legatees over, and also for *Thomas Neame* the younger, the residuary legatee, contended that the testator having pointed out the specific object for which the dividends in question were to be paid to his niece, the bequest must fail until there should be a person to answer the description. It was for the children of his niece, and not for herself. He has not used any words to shew that he contemplated the possibility of her requiring any separate means. If he had intended that she should at all events receive these dividends, why should he have made any mention of her children? It is evident that he had a distinct object in view; he has given an interest to none but the children, and it is intended solely for their benefit. The argument founded on the gift of the first half year's dividend to the residuary legatee is not conclusive, for that gift is to take effect even though the plaintiff should have children; his intention in that clause was, that in all events the residuary legatee should take a part, and if there should be no children, then during the intermediate period, he should take the whole of the dividends. There is no inconsistency in this bequest, for it is under a new state of circumstances that his claim to the intermediate dividends

is to take effect ; but even if this clause should be considered as excluding the residuary legatee, it would not apply to those defendants who are the legatees over of this legacy. The cases on the subject of legacies for putting the legatees out as apprentices, have no application. Those cases proceed on the principle that a benefit was intended to the legatee, and that he shall not be deprived of it by the negligence of the trustee whose duty it was to have applied the legacy for his benefit. Here it is not shewn that a benefit was intended for the plaintiff.

1818.  
HAMMOND  
v.  
NEMK.

*The MASTER of the ROLLS.*—There is some novelty in the expressions used by the testator in this case. The legacy is bequeathed to *Gibbs*, but he is a mere naked trustee, and if there should be any children of *Mrs. Hammond* the plaintiff, they are to be the *cestuique* trusts ; there is no direction as to any third person. For what purpose was her name introduced ? She was the testator's niece, and she does not appear to have any other provision by the will. There is certainly some obscurity in the manner of bequeathing the dividends, for there are no words to express that they are to be for her own use. It is an immediate bequest to her, except as to the first half year's dividends. The question is, whether the birth of children was intended to precede the vesting of these dividends in her ? If so, the bequest is conditional, and is to take effect provided only she have children ; but there are no such words of condition expressed. It is in terms an absolute bequest, with a direction that *Gibbs* shall pay the dividends immediately. The purpose of the bequest was that she might be enabled to provide for her children ; she is to be the hand to distribute it. The testator has directed that she is immediately to have the dividends although he knew she had no children at the time. I am therefore of opinion that this is an absolute gift of the dividends to *Mrs. Hammond*, and that she was herself the object of the bequest ; she was not compellable by law to maintain her children,

1818.  
  
 HAMMOND  
 v.  
 NEAME.

dren, their maintenance was the purpose and object for which it was bequeathed. If the testator had meant this to be a conditional legacy, it is probable that in the clause which bequeaths it over in default of issue, he would have mentioned not only the capital but also the accumulating dividends, whereas he speaks only of the capital. The gift of the first half year's dividends to the residuary legatee excludes the idea of the testator's intending him to have more. I agree that it does not necessarily follow, for even if there are children this bequest of the first half year's dividends is to take effect; but it would have been natural for him to follow it up by a direction as to the dividends in case of there being no children, had such been his intention. Upon the whole therefore I think *Mrs. Hammond* took these dividends as an absolute legacy.

Jan. 29, 1818. *Ex parte SKINNER.*—*In the Matter of the LAW FORD CHARITY.*

Petition under 52 G. 3. c. 101. (which gives a summary remedy in abuses of trusts for charitable purposes), praying to set aside an agreement for a lease of the charity estate between a

deceased trustee and the present tenant, directions for reletting, an account of receipts and payments by the deceased trustee, that his representative and the tenant might be charged with the full value of the estate from the date of the agreement, that the tenant might make compensation for mismanagement, an appointment of new trustees, a scheme for the administration of the funds, and an account of the assets of the deceased trustee:—dismissed, as not being within the act.

FOR the facts of this case, an abstract of the petition, the arguments of counsel, and the observations of the Lord Chancellor at the hearing of the petition, see 2 *Meriv.* 453. In addition to the relief there stated, the petition also prayed that the executrix of *Jarmain* the trustee might admit assets of his estate and effects for the purposes of the petition, or otherwise that proper accounts might be taken thereof.

*The*

The LORD CHANCELLOR on this day observed that it was impossible to give relief under the act of parliament (a); that there was an information embracing all the same objects, and that this petition was afterwards presented as one by which all those points might be disposed of, but that there was hardly one of them which was within the meaning of the act. His Lordship added, that he had varied in his opinion on the construction of this statute, but that no one could ever consider the present petition to fall within it: that it might be doubtful whether a petition seeking a variation of a lease would be within the act, but that one which prays an account of the assets of a deceased trustee could clearly never be within it.

1818.  
Ex parte  
SKINNER.  
In the Matter of  
the LAWFORD  
CHARITY.

Petition dismissed.

(a) 52 G. 3. c. 101.

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BAILEY v. WRIGHT.

Jan. 31, 1818.

BY indenture dated in 1794, previous to the marriage of the plaintiff with *Miriam Orrell*, 700*l.* belonging to the latter, was vested in trustees, as to 500*l.* in trust to pay the interest to the wife for her separate use during the joint lives of herself and her husband, and in case she should survive him, then in trust to pay the principal to her: but if she should die in the life-time of her husband, then in trust to pay the 500*l.* as she should appoint in manner therein mentioned, and in default of such appointment "in trust for the next of kin or personal representatives of the said *Miriam Orrell*:" and in trust to place out the remaining 200*l.* to the plaintiff during his life upon his bond and to pay the interest thereof to him, or permit him to retain the same during his life; and in case he should die in the life-time of his wife,

In a marriage settlement monies belonging to the wife were settled, in default of appointment by her, in trust for her "next of kin or personal representatives," subject as to part to a trust for the husband for life; held, that on the wife's death without exercising her power the husband was not entitled under the ultimate trust.

1818.  
  
 BALLEY  
 v.  
 WRIGHT.

in trust to pay the principal to her; but if he should survive then to pay the same to such persons, &c. as she should appoint, and in default of appointment, "*in trust for the next of kin or personal representative of the said Miriam Orrell.*" The wife died without issue and without exercising her power of appointment, and the bill was filed by the husband, claiming to be entitled to the trust monies under the ultimate trust contained in the deed: and the cause having been heard before the late Master of the Rolls, and his Honour having dismissed the bill with costs (a), the plaintiff appealed from that decree to the Lord Chancellor.

Mr. *Wyatt* for the plaintiff, contended, that notwithstanding the cases of *Watt v. Watt* (b) *Garrick v. Lord Camden* (c) and *Nicholls v. Savage* (d), the husband is to be considered as answering the description of next of kin of his wife. Those cases did not decide the question, but the determinations proceeded on the particular words which were there used. *Watt v. Watt* was decided on the words "next of kin of the wife's own family," and in *Garrick v. Lord Camden*, the widow was held not to be entitled under a direction in her husband's will that the property should be divided "amongst his next of kin, as if he had died intestate." These cases therefore do not decide the present question. Supposing, however, the husband not to be entitled under the description of next of kin, yet he is entitled as the personal representative of his wife. He would take *jure mariti*, and recover by representation. It will be contended however, that he is excluded by the words of the settlement. If the husband is not the next of kin, he is the nearest relation of his wife, and it is most probable that the intention was, that if the wife did not execute her power of appointment, the property should belong to the husband. If however the question be a doubtful one, the legal right of the husband should be allowed to prevail.

(a) 18 Ves. 49.

(b) 3 Pms. 244.

(c) 14 Ves. 372.

(d) Cited 18 Ves. 52, from a manuscript note of Mr. *Wetherell*.

Mr.

Mr. *Wetherell*, *contra*, was stopped by the court.

The LORD CHANCELLOR said, he had read the settlement, and taking it altogether, not only that part of it which relates to the 500*l.* but also that part which relates to the 200*l.* which bore strongly on the question, he was of opinion that the husband in this case could not be intended by the words next of kin or personal representatives, and consequently that the decree was right. His lordship added, that the interest as to the 200*l.* was evidently an interest to be provided for after the husband had enjoyed all he was to be entitled to.

Decree affirmed.

1818.  
BAILEY  
v.  
WRIGHT.

HOULDITCH v. HOULDITCH.

Feb. 4, 1818.

ON the 13th *June*, 1816, an order was made on the petition of the defendant for the taxation of his solicitor's bill of costs, the defendant submitting to pay to the solicitor what should appear due to him on taxation; and it was also ordered that all proceedings at law against the defendant on account of the said bill should be stayed until after the master should have made his report. In *April* 1817, whilst the taxation was proceeding, and before any report was made, the solicitor died intestate, and his administratrix caused the defendant to be arrested and held to bail on the 15th *January* 1818 in an action at law commenced by her for the bill of costs.

Where an order was made for the taxation of a solicitor's bill, and for staying all proceedings at law till after the master's report, and the solicitor died pending the taxation, and before any report, and no revived order for taxation being made, the solicitor's personal representative proceeded at law against the client: held that this was not a contempt.

A motion was now made on the part of the defendant that the administratrix and her attorney might stand committed as for a contempt.

Sir Samuel Romilly and Mr. Wakefield in support of the motion, contended, that it was not necessary to revive the  
VOL. I. C order

1818.  
 HOULDITCH  
 v.  
 HOULDITCH.

order for taxation, and that the defendant having undertaken to pay what should be found due on the taxation, that undertaking would be available to the administratrix.

Mr. *Wingfield*, contra, insisted that the order against proceeding at law was determined by the death of the solicitor, and that the defendant might have made an application to the court for a revival of the order. He also adverted to the length of time which the defendant had suffered to elapse since the solicitor's death, without proceeding in the taxation, the solicitor having died in *April* 1817, and the proceedings at law not having commenced till *January* 1818.

The LORD CHANCELLOR refused the motion, observing, that if the master could not proceed without a fresh order, it was impossible to consider the parties as guilty of a contempt; and his Lordship directed, that on the administratrix consenting to the defendant's now having a revived order, the administratrix and her attorney should have the costs of this motion.

#### ROLLS.

February 9, 16,  
 1818.

On a reference to a master, under stat. 52 G. 3. c. 101, giving a summary remedy in cases of abuses of charitable trusts, the master may receive evidence by affidavits, and cannot examine witnesses on interrogatories.

#### *Ex parte* GREENHOUSE.

ON hearing the petition presented in this matter under the act of parliament giving summary remedy in cases of abuses of trusts created for charitable purposes (a), an order was made (b), declaring that the corporation of *Ludlow* had been guilty of a breach of trust in pulling down *St. Leo-*

(a) 52 G. 3. c. 101. which enacts "that it shall be lawful for the Lord Chancellor, Lord Keeper and Commissioners for the custody of the great seal, and for the Master of the Rolls and the Court of Exchequer and they are hereby required to hear such petition in a summary

way, and upon affidavits or such other evidence as shall be produced on such hearing, to determine the same, and to make such order thereon and with respect to the costs of such applications as to him or them shall seem just."

(b) See 1 *Madd.* 92.

*hard's*

ward's chapel, and converting and disposing of the materials, and that they should be discharged from being feoffees or trustees of the charity estate; and referring it to the master to appoint new feoffees, and to enquire and state to the court what were the materials of the chapel and the value thereof at the time they were converted or disposed of, and what had become of the said materials, and that the master should enquire and state what would be the expense of restoring the chapel into the state in which it was when the breach of trust was committed.

1818.  
  
*Ex parte*  
 GREENHOUSE.

The master having made his report, a petition was presented by the corporation of *Ludlow*, praying that it might be referred back to the master to review his report, on the ground of his having received affidavits for the purpose of finding what the timber and other materials of the chapel amounted to at the time of disposing thereof, and the expense of restoring the same, and that he was not justified in forming any computation of such matters from such affidavits and *ex parte* evidence, but that he ought to have made his report upon the evidence of witnesses examined before him or commissioners appointed for that purpose, according to the established practice and usage of the master's office and of the court, and thereby to have afforded the corporation an opportunity of examining their witnesses, or of cross-examining those on the other side; and praying that the master might take the evidence by interrogatories to be exhibited in his office, or before commissioners duly appointed, according to the established practice and usage of the court.

Mr. *Hart* and Mr. *Phillimore* in support of the petition, contended, that the master ought to have proceeded to take evidence on interrogatories regularly propounded, and on which the other party would have an opportunity of cross-examining the witnesses. The persons who prepare affidavits will take care to put on the face of them nothing more



1818.  
  
*Ex parte*  
 GREENHOUSE.

than they wish to disclose, whereas on cross-interrogatories there is an opportunity of bringing out the whole truth. It will be contended that the form of the petition under this act distinguishes it from the ordinary course of proceeding, but there is no decided case on the subject, although some of the masters have considered that they ought to proceed on interrogatories. The act was intended merely to facilitate the proceedings as in a cause. If this had been a reference in a cause instituted by information, the master must have proceeded on interrogatories in the usual way, and we should have been entitled to the benefit of cross-examination. There can be no difference in principle between the proceedings instituted under the summary mode, authorised by the act, and those under an information. The act only provides what shall be the proceedings in court on the petition being presented, and does not in any way refer to proceedings in the master's office: it cannot be considered as taking away the ordinary mode of proceeding. The danger of proceeding on affidavits is strongly evinced in the present case, where the witnesses have positively sworn to the accuracy of plans and elevations professing to shew the state of this chapel at a period more than thirty years since, and the value of the materials, and on such evidence the master has founded his report. If this mode of proceeding is to be established, it will be extremely difficult for masters to act on such orders of reference, as each party will procure contrary affidavits. In a recent case under this act, an order was made for the examination of the parties on interrogatories.

Sir *Samuel Romilly*, Mr. *Bell*, and Mr. *Heald*, *contrà*. In causes it has been understood that it depends on the masters themselves whether they will proceed on interrogatories or affidavits, but in the present case the master had no power to administer interrogatories; he had no authority except such as the legislature has given him: a new tribunal has been constituted, giving certain judges named in the act,

act, power to decide in a summary way. It is not the Court of Chancery, it is the tribunal constituted by the act. The master has no more authority than the parties themselves; if the parties thought they ought to have evidence of persons who would not make affidavits, neither they nor the master, nor any of the judges named in the act have the power to compel such persons to give their evidence. It is said that if the witnesses are examined on interrogatories, evidence may be extorted from an unwilling witness, and that there is much inconvenience in proceeding on affidavits because there is no opportunity for cross-examination. If there is not the power to proceed by interrogatories, the argument of inconvenience is of no consequence; but it is a mistake to suppose that a party cannot be affected by evidence given in a mode which does not afford him an opportunity of cross-examination. In cases of bankruptcy and lunacy, and upon interlocutory applications to courts of law for setting aside judgments and annuity deeds, questions of great importance are decided on affidavits, and in many cases on affidavits alone. There is no instance of examining witnesses on interrogatories on a petition in lunacy or bankruptcy. In a late case on a reference in a cause, the master thought he was at liberty to proceed in either way; he received affidavits, and the Lord Chancellor thought he was wrong in that particular case. The case of the examination of parties does not apply; the court may order a party to be examined, for it is merely subjecting him to a discovery as in the case of a bill filed against him. On a reference to a master in a cause, he examines witnesses on interrogatories, but there the whole authority of the court is delegated to him, which is not the case here. When it is necessary to examine witnesses in a reference in a cause, the mode of proceeding is to obtain the master's certificate, and move for a commission, but there is no instance of such a motion under an order of reference in bankruptcy or lunacy. In those cases the master can only proceed on affidavits.

1818.  
  
*Ex parte*  
 GREENHOUSE.

Mr. Hart

1818.

*Ex parte*  
GREENHOUSE.

*Mr. Hart* in reply. It is a first principle of evidence that a party is not to be bound by the testimony of a witness whom he has not an opportunity of cross-examining. The practice of the master's offices is of no value except so far as it is established by the rules of the court. It is admitted that in a cause, a master cannot receive affidavits without consent. The act of parliament does not create a new jurisdiction, it merely gives to the ancient jurisdiction a more summary mode of proceeding, by dispensing with the long and tedious process which must have been gone through before a decree could be pronounced. It does not disable the court from receiving evidence on interrogatories, nor does it exclude the ordinary forms of proceeding. It appears that the court has deemed it consistent with the act to direct an examination of the parties, on what principle then can it exclude the examination of witnesses? If they are to be excluded, the objects of the act will in many instances be defeated, as there will be no means of extracting information from an unwilling witness, for the court cannot order a person to make an affidavit. When the act has not expressly given authority to proceed by affidavit except in the first stage of the proceeding, and has given no direction as to the mode to be adopted subsequently, it must be taken to intend that the ordinary manner of enquiry should be resorted to. There is no analogy between this case and bankruptcy, but if there were, instances may be found in bankruptcy, where in cases of conflicting evidence, interrogatories have been administered.

*The MASTER of the ROLLS.* At present it strikes me that the proceeding of the master is right. The question is not whether he has arrived at a just conclusion, but whether he ought to have received the affidavits at all, or to have directed interrogatories for the examination of witnesses by analogy to the common form of proceeding. This act of parliament certainly institutes a tribunal new in all its parts; it authorizes any two persons to present a petition; directs that

1818.  
  
*Ex parte*  
 GREENHOUSE.

that the petition shall be heard in a summary way, and that "upon affidavits or such other evidence as shall be produced upon such hearing" the court shall determine the same; so that if the same questions had come before the court, it is quite clear that they might have been determined on affidavits, and the determination could not have been impeached. Then is the master to institute a mode of proceeding different from that which is to be adopted by the court? The act does not *in terminis* authorise any reference to the master, and the question is, whether he is to adopt an analogy to the proceedings in causes. Why is he to do that, when in the former stages there is no such analogy? There may be great inconvenience in deciding difficult matters on affidavits, and that circumstance might perhaps have been an objection to the act *in toto*, but the legislature have thought there was a *balance of convenience* in favour of this mode of proceeding. Can the master institute a different mode of enquiry from that which is prescribed by the act, and which the court was bound to follow? All the inconvenience imputed to the proceeding by affidavits before the master would equally apply to that mode of proceeding before the court. The master has no power to issue a commission. This is a summary jurisdiction and to be taken strictly according to the mode prescribed. If the legislature had intended that there should be a different mode in the *ulterior* proceedings, they would have so expressed it, but they have been totally silent. With regard to the analogy to the proceedings in causes, which is contended for by the petitioners, why are we on a petition to adopt an analogy to another form of proceeding? The more natural analogy is to matters of petition, where they are in the habit of proceeding by affidavits. I cannot at present see that the master did wrong in receiving affidavits, but I will consider it and mention the subject again.

His Honour, on a subsequent day, said, that he remained of the opinion he had before expressed.

Feb. 16.

JONES

Rolls.  
Feb. 10, 16,  
1818.

JONES v. CURRY.

Where *A.* by his will gave real estate, and also personal estate consisting partly of household furniture, linen, and plate, to such persons as *B.* should by will appoint, and *B.* by her will attested so as to pass real estates, gave "all my estate and effects of whatsoever denomination," to certain persons subject to legacies and an annuity, and also gave "my household furniture, linen, and plate," but without any particular reference to the power, nor to the property subjected to it: held that this was not a good execution of the power, either as to the real or personal estate, and that parol evidence was not admissible to shew that *B.* had not personal estate of her own to satisfy the bequests; but that such evidence would be admissible as to the real estate, had a clear intention to pass real estate been apparent on the will.

**WILLIAM BROWNE** by his will dated the 17th January, 1810, gave and bequeathed unto the defendants *Curry* and *Drury*, a moiety or half part of certain freehold hereditaments, and also all his household furniture, beds, bedding, plate, linen and china, and his stock in trade, money, securities for money, debts, and all the residue of his real and personal estate and effects: To hold to *Curry* and *Drury*, and the survivor of them, and the heirs, executors, administrators and assigns of such survivor for ever; upon trust to permit *Isabella* the wife of *Robert Common* to have the free use and enjoyment of his household furniture, beds, bedding, plate, linen, and china, during her life: and from and after her decease, upon trust to divide and distribute the same household furniture, beds, bedding, plate, linen, china, or the money arising from the sale thereof (in case the same should be sold) among the children of *Isabella Common*; and in default of any such issue, child, or children, then he directed that his household furniture, beds, bedding, plate, and china, should go unto such person or persons as *Isabella Common*, should by her last will and testament, notwithstanding her coverture, give and bequeath the same: and upon further trust that the trustees should sell and dispose of his stock in trade, and get in all his outstanding estate and effects, and place out the monies arising therefrom upon government or real securities, and that they should pay all the rents, dividends, and proceeds of his said freehold premises and of the residue of all his personal estate and effects whatsoever, unto the said *Isabella Common* for and during the term of her natural life; and after the decease of *Isabella*

*Common*

*Common* should assign, &c. all his said freehold premises, and all the residue of his personal estate, amongst all her issue, child or children; and in default of any such issue, child or children, he directed that his said freehold premises, and all the said residue of his said real and personal estate, and effects whatsoever, should go unto such person or persons as the said *Isabella Common* should by her last will and testament, notwithstanding her coverture, give, devise, and bequeath the same estate and effects.

1812.  
JONES  
P.  
CURRY,

The testator died in *April* 1811, leaving *Robert* and *Isabella Common* surviving. *Isabella Common* after the death of her husband, by her will, dated 25th *September*, 1812, and attested by three witnesses, expressed herself in the following terms: "I give and bequeath unto my father and mother *Thomas* and *Ann*, all my estate and effects of whatsoever denomination, except the sum of 10*l.* per annum unto my sister *Mary* until she marries, with half of my trinkets and clothes, the other unto my sister *Ann Pearson*, with the sum of 100*l.* to be paid six months after my decease, and the same sum to my sister *Mary* after her marriage, but in case she should not marry, the 10*l.* per annum to be regularly paid every half year; at the decease of my father and mother, the property to be equally divided between my brothers and sisters share and share alike; and in case *Ann Pearson* dies before she receives her legacy, the same to be the property of *Thomas*, son of *Thomas* and *Ann Pearson*, likewise my household furniture, with linen and plate, to be equally divided between *Ann* and *Mary* my sisters; an inventory to be taken as soon as my decease, and not to be divided until the decease of my father and mother." The will also contained another bequest of a legacy of 50*l.* and a direction for the purchase of a gold ring.

*Isabella Common* died without issue, and the bill was filed by her father and mother, brothers and sisters, against *Curry* and

1818.

JONES

v.  
CURRY.

and *Drury* the executors of *Browne*, and against *Richard Elliott*, the heir at law of *Browne*, insisting either that *Isabella Common* took an absolute interest in the real and personal estate of the testator *Browne*, or that her will was a valid appointment of the real and personal estates of *Browne*, subject under his will to her disposal, and praying a declaration to that effect and a conveyance and account accordingly.

The plaintiffs went into parol evidence, the substance of which was, that after the death of the testator *Browne*, no sale of the household furniture, plate, and linen, which had belonged to him, was ever made, but those articles were taken to the residence of *Isabella Common* and her husband, and were possessed by *Isabella Common* up to the time of her death, and that she was entitled to no property in her own right, except a sum of 100*l.* and three sets of cotton furniture window hangings.

*Mr. Trower* and *Mr. Mathews* for the plaintiffs, abandoned the point made by the bill as to *Isabella Common* having taken the absolute interest, but they contended that by the will of *Isabella Common* the power of appointment given to her by the will of *Browne* was well executed. There is no express reference to the power, but it has long been settled that such a reference is not necessary, and that if it appears that the party meant to exercise the power, the court will give effect to the intention. Thus in *Probert v. Morgan* (a) Lord *Hardwicke* observes, that if a man has power to charge an estate, it is not necessary in the execution of it he should refer to the deed out of which the power arises, for in a court of equity it is enough that his intent appears, and if in the execution he sufficiently describes the estates he had a power to charge, the estate is certainly

(a) 1 Atk. 440.

bound. And in *Andrews v. Emmot* (a), there are observations of Lord *Kenyon* and Lord *Thurlow* to the same effect. In *Bennett v. Aburrow* (b) Sir *William Grant* expressly states that it is not now necessary that there should be an express reference to the power, but that the intention may be collected from other circumstances, as that the will includes something the party had not otherwise than under the power of appointment, that a part of the will would be wholly inoperative unless applied to the power. In the present case the will of *Isabella Common* will be inoperative unless it can be considered as an appointment, for the testatrix had no property out of which the annuity of 10*l.* could be paid. It is proved that she had no property whatever in her own right, except a sum of 100*l.* which is insufficient to answer the purposes of her will. She also bequeaths household furniture, linen, and plate, and it is in evidence that she possessed none of these articles except such as were the subject of the power, nor was she entitled to any real estate. If she had contracted debts, and had by her will directed them to be paid out of her estate, it could not be contended against creditors, that they should not be paid, because she had not referred to the power. Another argument in favour of her intention to exercise the power as to the real estate, may be drawn from the circumstance of the will being attested by three witnesses, for though the power does not prescribe any number of witnesses, yet it is evident that she had real estate in her contemplation, and she was entitled to none except that which was the subject of the power. In *Standen v. Standen* (c), the party exercising the power had no real estate, and her will was attested by three witnesses, which circumstance was much relied on by Lord *Redesdale* and Sir *James Mansfield*, who argued the case in support of the execution of the power, and Lord *Rosslyn* held the power to be well executed though on a different ground; and in *Bradly v. Westcott* (d) Sir *William*

1818.  
JONES  
v.  
CURRY.

(a) 2 Bro. C. C. 397.  
(b) 8 Ves. 616.

(c) 2 Ves. jun. 589.  
(d) 13 Ves. 445.

Grant,



1818.  
  
 Jones  
 v.  
 Curry.

*Grant*, though he dissented from the argument on which Lord *Rosslyn* proceeded in *Standen v. Standen*, thought the decision was right upon the argument of the counsel who contended that the power was well executed, but upon special grounds, depending on the circumstance that the will was attested by three witnesses, with reference to her power to dispose of that estate.

Mr. *Hart* and Mr. *Parker* for the defendants, admitted that a direct reference to the power was not necessary, but they contended that it must appear on the face of the instrument that it was the intention of the party to act on the subject of the power, so that the instrument is incapable of any rational construction unless it can be applied to the power. The question is not whether it is highly probable that the testatrix intended to execute her power, but whether she has given sufficient evidence to the court that such was her intention. The fact of the inadequacy of her own property to pay the legacies may be laid out of the case, for it is clear that the court cannot look at the circumstances of her personal estate for the purpose of giving a construction to the will, nor resort to extrinsic evidence to ascertain whether the bequest can be satisfied without reference to the property subject to the power. This appears clearly from the judgments of the Lord Chancellor in *Naynock v. Horton* (a), and of Sir *William Grant* in *Jones v. Tucker* (b). There is nothing on the face of this will to shew any such intention. If a testator gives all his household furniture, not being possessed of any at the time, it could not be considered as operating on furniture which was not strictly his own, for a will of personality is transitory, and he may intend that it shall pass articles of personality he may afterwards acquire. With regard to the real estate, there are no words indicating an intention to dispose of property of that description; according to the

(a) 7 *Yes.* 400.

(b) 2 *Merie.* 533.

late case of *Doe v. Rout* (a), it is at least questionable whether these words would have passed real estate of the testatrix herself, and the argument drawn from the attestation by three witnesses would there have been equally applicable, and yet the court of *Common Pleas* were unanimously of opinion that the real estate did not pass. There are no words in this will pointing at the power, nor any which may not be satisfied by being applied to property belonging to the testatrix herself.

1818.  
JONES  
&  
CLARK.

*The MASTER of the ROLLS.* In this case the plaintiffs had originally made two points; first, that *Isabella Common* took an absolute interest in the property in the event of her dying without issue; that point, however, was very properly abandoned, for it is clear, that under the will of *William Browne*, she took merely a life interest with a power to dispose of it by will.

Feb. 16.

This reduces it to the other point, namely, whether the will of *Isabella Common* was a valid appointment; and the first question is whether it can be collected on the face of *Isabella Common's* will, that she had executed the power given to her by *William Browne*, to dispose of his personal property after her decease without issue. I state this because it is now clearly settled that the court is precluded from going out of the will with regard to the personal property. Whatever may be the inability of the party to satisfy out of his own property the dispositions he has made, the court cannot examine into the state of the property at the date of the will, or at the death of the testator, notwithstanding the court may be satisfied it was the party's intention to execute his power. In *Jones v. Tucker*, which is a very strong case, Sir *William Grant*, although he declared that in his own private opinion the intention was to give the money which the testatrix had a power to dispose of, refused to direct an enquiry into the circumstances of her personal estate. As to the personal

(a) 7 Tarr. 79.

1818:

JONES

v.  
CUNRY.

estate therefore, the court must see whether any intention to exercise the power is apparent on the face of the instrument. It is clear that no such intention appears; it is expressed in terms applicable to her own property alone, and contains nothing referable to the power. The evidence adduced was such as ought not, consistently with the decisions, to be received, for it only went to shew that she could not mean her own property, in consequence of its insufficiency to answer the bequests.

The only remaining question (and without it the case is hardly open to argument) is respecting the real estate, whether it can be collected from the face of the instrument and extrinsic evidence, which in this case the court may resort to, that the intention of this testatrix was to execute her power. There is a shade of novelty in this case, but upon consideration I do not feel myself justified in pronouncing a judicial opinion that she intended to execute the power as to the real estate. The case of *Standen v. Standen* shews that with regard to real estate the court is at liberty to examine into the testator's property for the purpose of ascertaining whether he has any real estate of his own on which the devise may operate, and if in this case there had been an intention to dispose of real property, there would have been a right to resort to evidence. But here are no words to shew that the will would be inoperative unless resort were had to the real estate of *Browne*. The testatrix uses the words "my estate and effects of whatsoever denomination," which would probably have been sufficient to embrace any real property she might have been entitled to, but would they have gone beyond that to embrace property not belonging to her? It is all "my" estate; it is to comprehend only any property she might herself be entitled to, and the words would be satisfied by being applied to that property. To apply them to the property of *Browne*, you must reject the pronoun which confines it to property of her own: and though she had no real property, she

she had personalty to which the words might be applied; and to hold those words applicable to other property, would be to contradict rather than to give effect to the words of the will. There is nothing in the description sufficiently determinate and precise, to shew that the testatrix intended to dispose of the property of *William Browne*, nor is there any thing on the face of this will, which may not be satisfied by applying it to the property of the testatrix herself.

Bill dismissed without costs, except  
the costs of the trustees.

1818.

JONES  
v.  
CURRY.


CRAWSHAY v. COLLINS.

Feb. 4, 1818.

**B**Y an order made by consent in this cause, all matters in difference between the parties were referred to the award of three gentlemen of the bar, with liberty to any of the parties to apply to the court as they should be advised. The suit was instituted by the plaintiffs as assignees of *Noble*, a bankrupt, claiming to be entitled to certain shares in a business alledged to have been carried on by the defendants in partnership with the bankrupt. *Noble* having since the date of the order, and when the arbitrators had gone through nearly the whole case, become bankrupt a second time, a question arose respecting the necessity of obtaining the concurrence of his second assignees in the reference, and a conversation took place at a meeting of the arbitrators and the parties, in which some expressions were used by the defendant *Collins* and his counsel, which it was contended by the plaintiffs amounted to a countermand or revocation of the reference on the part of the defendant. In consequence of this, and with a view of obtaining the opinion of the Lord Chancellor on the subject, a motion was now made on the part of the defendant, that the arbitrators should be directed to proceed in the matter of the reference.

An order was made by consent referring all matters in difference in a cause to arbitration, with liberty to any of the parties to apply to the court as they should be advised: the court on motion refused to order the arbitrators to proceed in the arbitration although they had accepted the reference.

Mr.

1818.  
  
 CRAWSHAY  
 v.  
 COLLINS.

*Mr. Solicitor-General, Mr. Roupell, and Mr. Beames, in support of the motion, contended that the parties could not withdraw from the arbitration; that an order though made by consent could not be retracted, and that neither of the parties could without the authority of the court or the consent of the other, withdraw from the arbitration; but supposing they could, that there must be a formal notification to the arbitrators, something amounting to an express retraxit, and they insisted that the assignees under the first commission were capable of representing all the interest of the bankrupt; that the circumstances alledged to have taken place between the parties, did not amount to a determination of the reference, supposing the parties possessed the power of determining it.*

*Sir Samuel Romilly and Mr. Hart, contra, contended, that there was no precedent of such a motion. If the authority of the arbitrators is not determined, the order prayed for is unnecessary: if it is determined, the court cannot give it to them. The arbitrators must decide for themselves; they have no right to a judicial opinion in this way. If one of the parties refuses to appear, the arbitrators may proceed *ex parte*.*

*Mr. Solicitor-General in reply. There is certainly some novelty in the present application. The only reported case in which such an application appears to have been made, is Wood v. Leake (a), before Lord Erskine. In that case the motion was refused, but it does not seem that the arbitrator had accepted the reference: but in a case like the present, where the arbitrators are constituted by the court and have actually taken on them the burthen of the reference, the court has a controul over them, and they cannot recede. The gentlemen to whom this case has been referred, are anxious to proceed if the difficulty is removed. There is no doubt*

(a) 18 Ves. 412.

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that if one party may recede the right is mutual, but the principal question is whether *Collins* has receded in point of fact. With regard to the law, there is no case which applies precisely, or by analogy. In Lord Coke's time it was held (a), that in case of a reference by bond, the party may recede, but it is a forfeiture of the bond, but I do not find any rule laid down respecting a reference by order of court. In courts of law, where the parties agree that the submission shall be made a rule of court, they may recede before it is actually made a rule, but whether they can recede afterwards does not appear.

1818.  
CRAWFORD  
v.  
COLLINS.

*The LORD CHANCELLOR.* This motion brings forward a question which I do not know how to dispose of. The object, if I understand it rightly, is to determine whether *Collins* has put an end to the arbitration. On the one hand it is contended by *Collins* that he has not, on the other hand it is said, that on the occasion referred to, he said more than he now represents himself to have said, and that he did in fact determine it. But if I say that he did not determine the arbitration, the very hypothesis would be an admission that he might, and if you admit that he might, the other party might also determine it. And that lets in another question, whether the court is to say what the parties can do in such a case. There have been many cases and much discussion in this court, on the question whether arbitrators did not stand in the place of masters, but we have long ago got rid of that doctrine. It was once argued that exceptions might be taken to an award (b), but it was never contended that the court could order arbitrators to proceed, if they did not choose. What is to be the state of the

(a) See *Viguer's Case*, 8 Co. 81 b.  
(b) This appears to have been held in *Cresley v. Carrington*, 1 Vern. 469. *Hide v. Cooth*, 2 Vern. 109, and *Dick v. Milligan*, 4 Bro. C. C. 117. But in *Woodbridge v. Hilton*, 1 Bro. C. C. 396, and *Rice v. Williams*, 3 Bro. C. C. 163, the contrary was

held by Lord Thurlow, who said he did not agree with the cases in *Vernon*. The authorities on this subject are collected by Mr. Raithby in his notes to *Cresley v. Carrington* and *Hide v. Cooth*, *ub. sup.* and also to *Brown v. Brown*, 1 Vern. 158.

1818.  
  
 CRAWSHAY  
 v.  
 COLLINS.

court if it is to be applied to on every question which may arise in the course of a reference to arbitration? I should have thought that as the arbitrators best knew what had passed, they might have proceeded, leaving it to the plaintiffs to endeavour to stop them.

Motion refused, with costs.

Feb. 10, 11, 12.

WOOD v. GRIFFITH.

On a question on the construction of an award, the court will endeavour to discover such a meaning as will make it certain and final, rather than a contrary construction which would have the effect of defeating it.

The specific performance of an award will be decreed in equity, it being an agreement on terms pointed out by

a third person; and though equity will not specifically perform an unreasonable agreement, that doctrine does not apply to an agreement embodied in an award.

Therefore where *A.* and *B.* having jointly contracted for the purchase of an estate, submitted all matters in difference between them to arbitration, and the arbitrator awarded that they should join in authorizing a sale of their interest in the estate, although a suit was depending against them for the specific performance of the contract for purchase, and it was yet undetermined whether the vendors could make a good title, no report having been made under an order of reference as to the title in that suit, a specific performance of the award was decreed.

An award directing the sale of such an interest is not objectionable under the doctrine of maintenance and champerty.

The circumstance of the Court of K. B. having, after an examination of the defendant on interrogatories, and on receiving the report of its officer that the defendant was not in contempt, discharged a rule nisi for an attachment for non-performance of the award in refusing to sign an authority to sell the interest of himself and the plaintiff in the estate, is not a ground to prevent this court from decreeing a specific performance.

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money had been paid; and praying a specific performance of the articles, an account of principal and interest on the residue of the purchase-money, that the plaintiff might pay what should be found due, or that the estate or a competent part thereof might be sold to raise the amount; the appointment of a receiver in the mean time, and that the rents might be paid to the vendors, in liquidation of what was due to them.

1818.  
WOOD  
v.  
GRIFFITH.

In 1806, and for some time before that year, various actions and suits were depending between the plaintiff and defendant relative to the purchase of the *East Mark* estate and other transactions, and on the 4th of *July* 1806, by an order made at *Nisi Prius*, by consent, all matters in difference between them were referred to the award of Mr. *Cox*, which order was afterwards made a rule of the Court of King's Bench.

Mr. *Cox* made his award, bearing date the 9th *March* 1809, reciting the bill filed in the Court of Exchequer, and also a bill filed in this court by *Griffith* against *Wood*, praying the specific performance of an agreement between them respecting the *East Mark* estate, and that for that purpose *Wood* might be ordered to pay the remainder of the purchase-money for the same beyond what he had already paid, with interest, and might indemnify *Griffith* therefrom: and after further stating the pendency of the before mentioned suits, and that a receiver had been appointed in the suit in the Exchequer; the arbitrator declared that the agreement between the plaintiff and defendant respecting the *East Mark* estate was, that the estate was to be purchased on the joint account of the parties for the purpose of being improved, and afterwards sold in its improved state for their joint benefit, or at their joint risk; but that the plaintiff was to advance the purchase-money, and the defendant to attend principally to the improvement of the estate. The arbitrator further found that the plaintiff advanced 5000*l.* in *November* 1797, and 2000*l.* on the 1st *March* 1799, in part of the purchase-

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1818.  
  
 Wood  
 v.  
 Griffith.

money, and that he was entitled to be repaid the same out of the money to arise by the sale of the estate when the same should be sold on the behalf of the plaintiff and defendant as afterwards directed, if such purchase-money should be sufficient for that purpose; and if not, then that the deficiency ought to be paid by the plaintiff and defendant in equal moieties as after mentioned.

After directing the mode in which the rents of the *East Mark* estate, since the plaintiff and defendant had been in possession, ought to have been applied, and awarding a sum of 1250*l.* to be due from the defendant to the plaintiff with reference to those principles and on taking the accounts between them; and after declaring the plaintiff and defendant to be equally liable to certain bills of costs for business done on account of the *East Mark* estate; the award further declared, that all the right, title, and interest of the plaintiff and defendant in the *East Mark* estate ought to be forthwith sold, and that the plaintiff and defendant were to be equally interested in, and liable to all benefit and loss which might ultimately arise or happen from such sale; and inasmuch as *Beach*, *Messiter*, and *Pitt*, had by their bill, filed in the Court of Exchequer, prayed that in default of immediate payment by the plaintiff and defendant of what should be found due for principal and interest on the residue of the 23,000*l.*, the estate or a competent part might be immediately sold under a decree of that court to raise the amount of what should be found due; the arbitrator further directed that the plaintiff *Wood* should sometime within the first six days of *Easter* term then next, or as soon afterwards as the Court of Exchequer should think fit to hear the application, cause a motion to be made, praying the court to direct a sale of the *East Mark* estate in one lot by public auction, before the Deputy Remembrancer, at such time as the court should think proper, with liberty for *Wood* and *Griffith* respectively to bid for the same at such sale, and that *Griffith* should consent to such application; or in case  
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the plaintiffs in the suit in the Court of Exchequer, should in the mean time apply to that court to direct such sale, the arbitrator directed *Wood* and *Griffith* respectively to consent thereto; and in either of those cases he directed that *Wood* and *Griffith* respectively should consent that if he should be declared the purchaser of the premises at such sale, he would accept such title thereto as *Beach*, *Messiter*, and *Pitt* should be able to make thereto, and that he should pay his purchase-money and complete his purchase forthwith; and in case the court should direct such sale, then the arbitrator further awarded that so much (if any) of the purchase-money, and the monies in the hands of the receiver, and by him paid or to be paid into court, on account of the rents and profits of the estate, as should remain after paying and satisfying what the court should think fit to be paid thereout to the plaintiffs in the suit in the Exchequer, or any of them, for such part of the principal and interest of the 23,000*l.* as remained due to them under the contract with *Griffith*, and their costs, and any other payments which the court should direct to be made thereout, should be applied, first, towards payment to *Wood* of the 5000*l.* and 2000*l.* with interest; and the residue of such purchase-money should be equally divided between *Wood* and *Griffith*; but that *Griffith's* share should be liable to the 1250*l.* before declared to be due from him: but in case the Court of Exchequer, upon such application, should not direct a sale of the estate, that then *Wood* and *Griffith* should, within 14 days after the court should have signified such its determination, join in giving a proper authority in writing for Messrs. *Hoggart* and *Phillips*, auctioneers, to sell "all the estate, right, title, and interest" of *Wood* and *Griffith* to the said premises, by public auction within six months after such authority should be given; at which sale *Wood* and *Griffith* respectively were to be at liberty to be bidders, and the price for which such estate, right, title, and interest to and in the premises should be sold at such sale, should, after payment of all incidental expences,

1818.  
*Wood*  
 v.  
*Griffith*.

1818.  
*Wood*  
 v.  
*Griffith.*

pences, be applied in the same manner as is before directed respecting the surplus of the purchase-money of the estate if sold under the directions of the Court of Exchequer, after satisfying the payments which the court should direct to be made thereout: and in either of the cases aforesaid the arbitrator directed, that *Wood* and *Griffith* respectively should execute all proper and necessary conveyances of the premises, and of their respective rights and interests, to the purchaser or purchasers thereof, and do all acts necessary to carry such sale into effect.

The award then proceeded in the following words:—"But if in either of the cases aforesaid it shall appear that the said *Michael Hicks Beach*, and *Henrietta Maria*, his wife, *Richard Messiter*, and *Joseph Pitt*, cannot make a good and sufficient title to the said premises, or any part thereof, or if for any other reason the said contract for the sale of the said estate, as between the said last-mentioned parties, and the said *Sir Mark Wood* and *Edmund Griffith*, cannot be carried into execution; then inasmuch as the said *M. H. Beach*, *H. M.* his wife, and their said trustees are not parties to this reference, it does not appear to me that I can make any specific award concerning the said *East Mark* estate; but I award and direct, that 'if upon the completion of any sale of the said estate, or of the interest of the said *Sir Mark Wood* and *Edmund Griffith* therein as before directed, or upon the vacating or rescinding the said purchase contract for want of a good title or otherwise as aforesaid, the said *Sir Mark Wood* shall not receive from the net produce of such sale, or from the said *M. H. Beach*, or the said trustees, or out of the said Court of Exchequer, or otherwise, the whole of the said sums of 5000*l.* and 2000*l.* so advanced by him as aforesaid, with interest as aforesaid, then the said *Edmund Griffith* shall make good and pay the said *Sir Mark Wood* one moiety of the deficiency of the said two principal sums and interest; and if in either of the said last mentioned cases the monies to be received by *Sir Mark Wood* shall exceed the  
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said sums of 5000*l.* and 2000*l.* and interest, then I award and direct that the said *Edmund Griffith* be entitled to a moiety of such excess, and the said *Sir Mark Wood* to the other moiety thereof."

1818.  
  
 WOOD  
 v.  
 GRIFFITH.

Pursuant to the award the plaintiff caused a motion to be made in the Court of Exchequer within the first six days of *Easter* term 1809, that the Court would direct a sale of the *East Mark* estate in one lot by auction; to which motion the defendant consented, but *Beach* and the other plaintiffs in the suit in the Court of Exchequer objecting to the motion, it was, after standing over several times, ultimately refused on the 12th *February* 1811.

Previous to the hearing of the motion, an order had been made in the suit in the Exchequer, referring it to the Deputy Remembrancer to enquire whether a good title could be made to the *East Mark* estate; and no report had been made at the time the motion came on to be heard.

On the refusal of the motion by the Court of Exchequer, the defendant was applied to for his signature to a proper authority to *Hoggart* and *Phillips* to sell the interest of the plaintiff and defendant in the *East Mark* estate, but which the defendant refused, alledging, that according to the true construction of the award he was not bound to consent to a sale until a good title should be reported. The plaintiff thereupon in *Easter* term 1811, obtained a rule nisi in the Court of King's Bench for an attachment against the defendant for a contempt "in not joining the plaintiff in giving an authority in writing to *Hoggart* and *Phillips* to sell all the estate, right, title, and interest of the plaintiff and defendant in the *East Mark* estate" pursuant to the award, and the defendant thereupon put in bail to the attachment, and to answer interrogatories to be exhibited before the master. In his answer to the interrogatories the defendant set out at length that clause of the award in which the arbitrator declared, that if it should appear that *Beach*, *Messiter*, and *Pitt*, could not make a good title to the premises, or if  
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1818.  
  
 WOOD  
  
 GRIFFITH.

for any other reason the contract between those parties and the plaintiff and defendant, could not be carried into execution, the arbitrator could not make any specific award concerning the *East Mark* estate; and the defendant also stated the proceedings in the Court of Exchequer, and that it did not yet appear that *Beach* and the other vendors could make a sufficient title to the estate; and that therefore he had not disobeyed the award.

The defendant was thereupon reported not to be in contempt, and the rule nisi for the attachment was discharged in *Trinity* term 1811. The present bill was filed on the 21st *January* 1812, praying that the defendant might be decreed specifically to perform the award so far as relates to the sale of all the estate, right, &c. of the plaintiff and defendant in the *East Mark* estate, and that the defendant might be directed forthwith to sign the authority to enable *Hoggart* and *Phillips* to sell the estate, right, title, and interest of the parties in the *East Mark* estate; or that it might be referred to the master to settle a proper authority for that purpose, and that the defendant might sign the same which settled, and do all other necessary acts for perfecting such sale.

The cause came on to be heard at the Rolls before Sir *William Grant*, on the 22d of *March* 1814, when his Honour pronounced a decree, declaring that the defendant was bound to perform his part of the award in joining with the plaintiff in the sale of all the estate, right, title, and interest of the plaintiff and defendant in the *East Mark* estate; and it was ordered that the defendant should join the plaintiff in signing an authority to *Hoggart* and *Phillips* to sell all the estate, right, &c. of the plaintiff and defendant in the said estate, pursuant to the award; and in case the parties differed about the form of the authority, the master was to settle the same, and that the defendant should sign the authority when so settled: and when such sale should be made, it was ordered, that the plaintiff and defendant should respectively execute  
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all proper and necessary conveyances of their respective rights and interests in and to the *East Mark* estate, to the purchaser or purchasers at such sale, and do all acts necessary to carry such sale into effect; and that the monies for which the said estate, right, &c. of the plaintiff and defendant in the *East Mark* estate should be sold, after payment of all incidental expences, should be paid and applied as directed in the award.

1816.  
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Garrison.

On the 23d May 1815, an order was made by the defendant's consent, referring it to the master to settle and approve of particulars and conditions of sale pursuant to the decree; and the master having reported that he had accordingly approved of them, the sale took place on the 15th September 1816, when the estate, right, &c. of the plaintiff and defendant in the *East Mark* estate was purchased by Mr. *Parquhar* for 10,000l.; and it was referred to the master to settle a proper conveyance; but before he made a report on that reference the defendant presented a petition of appeal to the Lord Chancellor against the decree at the Rolls.

The master having approved of a conveyance, and it having been tendered to the defendant for his execution, and he having been attached for refusing to execute it, he was, on the 10th July 1817, discharged, on his delivering the instrument of conveyance as an escrow, to be deposited in the master's office to abide the event of the appeal.

No report on the title had been made by the Deputy Remembrancer at the time of the original hearing, nor of the hearing of the appeal.

The appeal came on to be heard before the Lord Chancellor, in July 1817, and having been argued by Sir *Samuel Romilly*, Mr. *Leach*, and Mr. *Cooke*, for the plaintiff, and Mr. *Hart* and Mr. *Spranger* for the defendant, stood for judgment.

The

1818.

Wood

v.

GRIFFITH.

Feb. 10, 11, 12.

*The LORD CHANCELLOR*, after minutely detailing the facts of the case, and commenting on the language of the award, stated the questions to be, First, what is the meaning of the award with reference to the construction the plaintiff and defendant have respectively put upon it. On the part of the plaintiff it is said, that having applied to the Court of Exchequer for a sale as directed, and the defendant having consented, and the Court of Exchequer having refused to accede, the award is to be understood thus;—that as by the refusal of the court, the direction as to the sale of the estate became ineffectual, the interest which the plaintiff and defendant had under the contract was to be put up to sale. On the other side it is said, that until it could be seen that there was that good title concerning which it was referred to the Deputy Remembrancer to inquire, it could not be the meaning of the arbitrator that the equitable interest was to be sold, and that the decree directing such sale is therefore wrong.

Secondly, Whether supposing the former to be the meaning, and looking at the award as being to be specifically performed because it is founded on an agreement; the award can be considered so unreasonable as that no performance of it can be decreed; founded on this, that the circumstance of the estate being directed to be sold before it can be known that there is any title to it, would lead to such depreciation, that a court of equity will not decree the performance of the award, but leave the plaintiff at liberty to endeavour to enforce it in a court of law by attachment.

Thirdly, Whether the award can be affected on the ground of champerty or maintenance, because it is contended that it calls on the parties to do that, which if done, would amount to champerty, or buying pretended titles.

Fourthly, Because the question has been already determined in the Court of King's Bench, that court having dismissed the complaint of the plaintiff, on the report of the officer that no contempt had been committed.

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As to the construction of the award, his Lordship expressed his clear opinion that the meaning of the arbitrator was, that the right, title, and interest of the plaintiff and defendant, whatever it might be, should forthwith be brought to sale; and that the arbitrator having first provided for the case of a sale of the estate with the consent of the original vendors, proceeded to give directions respecting what was to be done in the event of their not consenting, in which case the plaintiff and defendant were to join in giving an authority to the auctioneers to sell their "estate, right, and interest" in the premises. But it then occurred to the arbitrator that a title might not be made by the vendors in the original contract; and in that case he declared that he could not make a specific award, because the vendors were not parties to the reference; but that does not make the award less final and conclusive between the plaintiff and the defendant:—for they being the absolute owners in equity, had a right, title, and interest, which would enable their vendee to deal with the vendors in the Court of Exchequer. It is clear, that every award must be certain and final; but it has always (and more especially in modern times) been considered the duty of courts of justice, taking the whole of the award together, to put such a construction upon it as will make it final and certain, rather than a construction which would destroy most of the awards which are made. I am surprised that the Court of King's Bench should not have asked the arbitrator what was his meaning:—without professing to be familiar with the present practice of that court, I remember that at one period the uniform practice was to ask the arbitrator.

But it is said that this construction of the award clashes with that which was given to it by the Court of King's Bench; if so, I ought to have taken more time before I came to a contrary decision. But I cannot lay much stress on the supposed opinion of the Court of King's Bench, for it is, I believe, their practice to adopt the opinion of the officer as to a contempt,

1813.  
Wood  
v.  
Griffiths.



1818.

Wood

v.

Griffiths.

tempt, whether they agree to it or not. I therefore do not consider that a point of much importance.

There is however a difficulty which I have felt, but which at length I have got over. That a bill will lie for the specific performance of an award, is clear; for the award contains nothing more than an agreement, on terms which a third person points out. But a court of equity has always held it to be in its sound discretion whether it will perform what it considers an unreasonable agreement; and I was much struck with the fact, that these parties were directed to bring to sale a property circumstanced like this; viz. that the fact of its being in dispute in the Court of Exchequer, must throw a damp on the sale, and prevent it from producing its full value. The party who has purchased will have to pay 16,000*l.* besides, so that he will pay upwards of 26,000*l.* in all, the plaintiff and defendant having given 23,000*l.* No one can dispute the proposition, that if a man agrees to sell me an estate in fee-simple, and cannot make a title to the fee-simple, I can insist on his giving me all the title he has. He cannot say he will give me nothing, because he cannot give me all I have contracted for. If he contracts to sell a fee-simple, and has only a term of 100 years, I have a right to that term if I think fit. I estimate the unreasonableness too high. But this is not an agreement of *A.* with *B.* It is an agreement embodied in an award; and by applying to it the principle that a judge of the party's own choosing has so decided it, it is an agreement which the court has carried, and will carry into effect. This being the determination of the judge of the party's own choosing, I cannot say it shall not be performed.

But it is said that the law will not permit its performance. What foundation is there for this objection in the settled practice of the court? The court is in the uniform habit of saying that the plaintiff in a bill for a specific performance, is entitled to have what the defendant can give him. It is extremely clear that an equitable interest under a contract, is a subject of sale, and the party claiming under it becomes a trustee of the benefit

benefit of it for the person with whom he contracts, without any covenants whatever; the purchaser is obliged to indemnify him for every proceeding he adopts for his benefit, and a court of equity would compel him to suffer his name to be used if necessary. I presume that the arbitrator's meaning was, that the "estate, right, title, and interest" of the plaintiff and defendant should be brought to sale before the determination of the suit in the Court of Exchequer. It is nothing more than this, which happens every day—the plaintiff and defendant having bought, sell their equitable interest (being directed to do so) to *A. B.*—*A. B.* if he chose to *sist* himself in the Court of Exchequer in his proper person, might say, I have become the purchaser—make me an estate in fee-simple according to the contract if you can; if not, such an estate as you can make me, and I will take it. He says *no more than the plaintiff and defendant might have said if they had not sold.* In contemplation of equity they become trustees, and the person to whom they sell, stands in their place, and may call on them as his trustees to make use of their names to hand over to them the benefit of that sub-contract. If I were to hold this maintenance or champerty, I should shake the transactions of every day. Sales of equitable interest are the subjects of every day's practice.

As to what passed in the Court of King's Bench, I think *this court is not bound by it.* I do not think it was the deliberate opinion of the judges, that such was the construction of the contract; but if it was, weighty as their opinion is, it is the duty of a judge sitting here to give effect to his own opinion. It was however in truth only the opinion of the officer. Upon the whole I cannot avoid saying that this decree ought to be affirmed.

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On the 14th *March* an order was made, on the motion of *Mr. Cooke*, on the part of the plaintiff, that the deed of conveyance executed by the defendant as an escrow, and deposited in the master's office, might be delivered up.

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1818.  
WOOD  
&  
GRIFFITH.

1818.  
  
 WOOD  
 v.  
 GRIFFITH.

*The* LORD CHANCELLOR, on making the order, expressed himself to the following effect, respecting the judgment pronounced by him on the appeal.—The bill prayed that the award might be specifically performed; on this basis, that it was to be considered as a contract. The Master of the Rolls was of opinion that it was an agreement by which the plaintiff and defendant obliged themselves to concur in bringing to sale their interest in an estate, the title to which was not yet shewn to be good, and where the question was depending in the Court of Exchequer on a bill by the original vendors against the present plaintiff and defendant for a specific performance, and whilst there was yet a reference on the title. The Master of the Rolls was of opinion that in case the motion directed by the arbitrator miscarried, the arbitrator had still provided that the “estate, right, title, and interest,” under the contract, should be sold, and the property carried to market in circumstances under which it is obvious it could not be sold without great difficulties and embarrassments. It appears that the plaintiff advanced considerable sums, and the purchaser of the “estate, right, title, and interest” might be entitled, in the event of a title not being made, to have them re-paid, and to a lien for them. It might turn out that the original vendors had no interest in the estate, and then the purchaser of the “right, title, and interest” would only have a personal demand against those who had received the money. The case then came before me: and I do not disguise that I came to the consideration of it most unwillingly, because it was next to impossible that the interest should be sold without loss and disadvantage to one or both of the parties. I took great pains to persuade myself that the judgment was wrong, and that the award had not the meaning which was attributed to it by the Master of the Rolls. But I was of opinion that such was its meaning, and if so, that it was an agreement to be specifically performed. It was argued that this was not its meaning, and that if it was, yet that as it was to bring the property to sale under such circumstances, a court of equity would

would not assist; and thirdly, that it was within the doctrine of champerty and maintenance: but it appeared to me impossible to apply the principle of non-performance to an agreement in an award; for the parties give to the act of the arbitrator, an authority which could not be given to their own acts; and as to the other question, I thought that the court had been every day for the last forty years, driving parties to a violation of the law, if this was champerty.

1818.  
Wood  
v.  
GAFFITH.

AKHURST v. JACKSON.

Rolls.  
Feb. 16.

**B**Y indenture dated 24th June 1812, *John Phillips* and the defendants *Heuster* and *Jackson* mutually covenanted that they would be partners in the trade of a fishmonger on the terms and conditions after mentioned: that the trade should be carried on at the shop in the dwelling-house of *Phillips* in *New Bond Street*, under the firm of "*Phillips and Heuster*": that the copartnership should commence on the 29th of June instant, and should continue for 18 years thence next ensuing, and after the expiration of that term for a further term of one year, and so on from year to year if circumstances should permit: that the floating capital of the partnership should be 2000*l.* of which 1000*l.* should be brought in by *Phillips*, 500*l.* by *Heuster*, and 500*l.* by *Jackson*: that *Heuster* and *Jackson* should pay their proportions of the floating capital on the 29th June, and that *Phillips* should pay in his share as his outstanding debts should be got in, yet nevertheless that the whole of his proportion should be paid on or before the 29th of September then next: that the lease of the house and shop which *Phillips* then held for a term of 23 years wanting 10 days from *Michaelmas* 1807, at the yearly rent of 265*l.* should be assigned to the partnership, and the same with the implements and utensils used by *Phillips* in carrying on the business of the shop, should

Where *A.* carrying on business alone, took *B.* and *C.* into partnership, which was covenanted to be carried on for 18 years, in consideration of a sum of money to be paid to *A.* by *B.* and *C.* by instalments; and within six months after the commencement of the partnership, and when one only of the instalments had become due, *A.* became bankrupt: Held, that notwithstanding the bankruptcy, *B.* and *C.* were liable to pay the remaining instalments at the times when they would have become due if the partnership had continued.

1818.

AKHURST

v.  
JACKSON.

should be considered as the stock in trade of the partnership, and the partners should from the 24th *June* be interested in the same in the shares in which the floating capital was advanced by them : that 3500*l.* should be the consideration for *Heuster* and *Jackson* being received in the said partnership, and for the purchase of their shares of the said stock in trade; the 3500*l.* to be paid or accounted for by them as follows, 700*l.* should be allowed thereout to *Heuster* for the good-will of his trade of a fishmonger then carried on by by him in *Wigmore Street*, and for the purchase of his moveable stock; 1000*l.* other part of the 3500*l.* should be paid on the 29th *September* then next, 1000*l.* other part thereof on the 25th *December* then next, and 800*l.* the remaining part of the 3500*l.* on the 25th *March* 1813.

At the time of the execution of this deed, and for several years previous, *Phillips* carried on separately, the trade of a fishmonger in *New Bond Street*, and at the date of the deed he was, to the knowledge of the defendants, in embarrassed circumstances for want of a present sum to answer the demands of his creditors. In pursuance of the deed, the partnership commenced on the 29th *June* 1812, and continued to be carried on till the 6th *November* 1812, when a commission of bankrupt issued against *Phillips*, founded on an act of bankruptcy in the preceding month, and the plaintiffs were the assignees under that commission. At the time of issuing the commission the first instalment of the 3500*l.* was due, and the greater part of that instalment had been paid.

The bill was filed on the 23d *July* 1813, by the assignees of *Phillips*, against *Jackson* and *Heuster*, praying an account of the sums paid or allowed by the defendants on account of the 3500*l.*; that the balance of the 3500*l.* remaining unpaid might be ascertained; that such balance might be decreed to be paid to the plaintiffs, and also praying an account of the partnership property and dealings. And the question was whether the partnership being determined by the bankruptcy, the defendants were liable in equity to the payment of that part

part of the 3500*l.* which had not become due previous to the bankruptcy.

1818.  
AKHURST  
v.  
JACKSON.

Mr. *Roupell*, for the plaintiffs, contended, that notwithstanding the bankruptcy of *Phillips*, the defendants were liable to the payment of the balance of the 3500*l.* remaining unpaid at the time of his bankruptcy. The defendants knew that *Phillips* was in bad circumstances, and dealt with him notwithstanding their knowledge of that fact. They supposed they were to be partners with him in a valuable concern, but they understood him to be in want of an immediate sum of money with which it was expected he would be able to extricate himself. It was on their part a purchase of a contingency, and although the event has proved unfavourable, that is not a sufficient ground for equity to relieve them from the performance of their agreement.

Mr. *Bell* and Mr. *Wilbraham*, contrà, observed that there might be a difficulty in resisting an action at law on this covenant, it being questionable whether the covenants in the deed could be considered as dependent, so as to render it necessary for the plaintiffs to aver performance of the covenants entered into by *Phillips* (a), but they contended that as the defendants could not now have that for which they contracted, a court of equity would not call on them for payment of the consideration. The subject of purchase here was a share of the good-will of a trade which was annexed to the person of *Phillips*, who agreed to carry it on in conjunction with the defendants for 18 years, and within three months from the date of the contract, by committing an act of bankruptcy he precludes himself from all power of performing the contract, and yet his assignees now call for payment of the money. Suppose the case of a person who for 1000*l.* to be advanced by instalments at *Christmas* and *Lady*

(a) On this point see *Fordage v. 2 Savnd. 330.* and the notes of Mr. *Cole, 1 Saund. 320. Peeters v. Opie, Serjeant Williams* on those cases.

1818.  
 ~ ~  
 AKHURST  
 v.  
 JACKSON.

*Day*, agrees to transfer the good-will of a trade, but having before the last instalment is paid, surrendered the lease of the premises in which the business was carried on, demands payment of the money. It is clear that as he would no longer be able to do that which he had contracted to do, equity would not permit him to receive the money. The circumstance of bankruptcy cannot vary the case, for the assignees can only take subject to all the equity with which the property was affected in the hands of the bankrupt. If the money had been actually paid over, the defendants' remedy might have been difficult, unless it could be considered that bankruptcy amounted to a breach of the covenants on the part of *Phillips*; but here the money is yet in the hands of the defendants.

Mr. *Roupell* in reply observed, that the conduct of the bankrupt could not affect the rights of his assignees. The defendants contracted for that which in its nature was a contingent interest. It cannot be contended that *Phillips* was to guarantee to them the continuance of the partnership for 18 years; it might equally be argued that he was to guarantee that the trade should be a profitable one. The defendants might have guarded against the event which has happened. They knew that *Phillips* could not pay his debts, and they advanced money for the purpose of enabling him to retrieve his circumstances; if he had done so, they would have shared a profitable trade. It is evident that they must have considered his bankruptcy as an event not improbable to happen. The terms of the deed are clear, and it is admitted that the defendants are bound at law; the plaintiffs' only reason for not proceeding at law is that they seek an account. It is said that *Phillips* cannot perform his contract. The contract was that they should become partners, which they accordingly did. They had the benefit for which they contracted.

*The MASTER of the ROLLS.* The absence of all authority on this subject is a strong circumstance against the defendants.

defendants. In all partnerships there is necessarily a great loss by the bankruptcy of any of the partners. Supposing a person to give 10,000*l.* to be admitted as a partner in *Child's* house, and that they should unfortunately become bankrupt, there can be no doubt that he would lose his money. In most of the partnerships which have been entered into for many years back, there must have been instances where the partners have suffered great loss. It is the contingency incident to every partnership. The defendants expected its continuance for many years, but by this misfortune it was determined in a few months. They were to pay 3500*l.* to be let into partnership, and they were let into partnership. I cannot interfere to say that equity shall stop the payment of the instalments. The partners might have introduced some stipulation on the subject. It is not a breach of the contract, it is a determination of the partnership by means by which it was in its nature liable to be determined. The bankrupt took the defendants into partnership subject to all the incidents of the subject matter. The defendants must perform their contract, but it is not a case for costs.

1818.  
AKHURST  
v.  
JACKSON.

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BELL v. FREE.

ROLLS,  
Feb. 17, 20.

**B**Y indenture dated 6th *March* 1800, *George Clark* and *Thomas Plummer* jointly and severally covenanted with *Frances Du Puy*, to pay to her during her life an annuity of 300*l.* by half yearly payments; and by another indenture dated 7th *March* 1800, after reciting the former deed, and that it had been agreed between *Clark* and *Plummer* that notwithstanding their joint covenant to pay the annuity, yet

*A.* and *B.* by deed jointly and severally covenanted with *C.* to pay her an annuity during her life, and by another deed of the same date *A.* and *B.* covenanted with each other

that each should pay one-half of the annuity, and indemnify the other against all actions, "damages, demands, sums of money and expences, which might be incurred by reason of the non-payment thereof:" Held that *B.* having in consequence of *A.*'s insolvency made several payments of *A.*'s moiety of the annuity, was not entitled to interest on the sums he had so paid.

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1818.

BELL

v.  
FREE.

that each of them, his executors or administrators, should pay one moiety thereof, and that the survivor in case of the decease of one of them in the life-time of the annuitant, should not be liable to pay the whole of the annuity: each of them the said *George Clark* and *Thomas Plummer* thereby for himself, his heirs, executors, and administrators, covenanted with the other of them, his executors, administrators, and assigns mutually, that each of them, his executors or administrators should, from time to time and at all times thereafter during the life of *Frances Du Puy*, well and truly pay one moiety or half part of the said annuity of 300*l.* at the times mentioned in and according to the true intent and meaning of the indenture of the 6th *March* 1800, and well and effectually save, defend, keep harmless and indemnified, the other of them, his executors, &c. against one moiety or half-part of the said annuity, and all actions, suits, costs, charges, damages, demands, sums of money and expences whatsoever, which might be incurred by reason of the non-payment thereof in the manner covenanted by the recited indenture to be paid by *Clark* and *Plummer* to *Frances Du Puy*.

*Clark* having become insolvent in *March* 1809, all the payments of the annuity after that time were made by *Plummer* alone; and *Clark* having afterwards died, this suit was instituted by his creditors, and the ordinary decree was made referring it to the Master to take the usual accounts of his estate and of his debts. The master having by his report certified that a sum therein specified was due to *Plummer* for cash paid for several half-yearly payments of the annuity, but having disallowed a claim made by *Plummer* of interest on that sum, a petition was now presented by *Plummer*, stating that the interest on the several payments of the said moiety of the annuity up to the date of the report, amounted to 183*l.* 11*s.* 9*d.* and praying that the petitioner might be allowed and paid that sum over and above the sum reported due to him.

Mr.

Mr. Heald and Mr. James Stephen in support of the petition, contended that interest on the sums paid might be recovered at law in the shape of damages; that it fell clearly within the meaning of the words "charges, damages, sums of money, and expences incurred by reason of the non-payment" of the annuity; and that the master ought to have allowed the petitioner's claim of interest.

1818.

BELL

FRANK.

Sir Arthur Piggott, Mr. Hart, and Mr. Winthrop, contra, observed, that there was no precedent of the allowance of a claim of this nature, that it was quite inconsistent with the settled and uniform practice of the court; that this was a demand of unliquidated damages; that the master sitting in his office could not give damages, and that there could be no damages in the case of a debt not carrying interest in its nature.

The MASTER of the ROLLS, after taking time to consider, was of opinion that the petitioner was not entitled to interest. His Honour observed, that it had been contended that the petitioner could have recovered interest in the shape of damages, but that in the case of *De Havilland v. Bowerbank* (a), Lord Ellenborough said that the rule of considering how far the party was damnified was so wide that it would let in interest in almost every case; that if the party lost the use of his money, it was his own fault in not suing for it, and that he considered the safe rule to be, that to establish a right to interest there should either be a specific agreement to that effect, or something should appear from which a promise to pay interest might be inferred, or proof should be given of the money being used. And in the subsequent case of *De Bernales v. Fuller* (b), the Court of King's Bench adopted the rule so laid down. His Honour said he would mention another subsequent case at law for

Feb. 20.

(a) 1 Campb. 50.

(b) 2 Campb. 426.

the

1818.  
 BELL  
 v.  
 FREE.

the purpose of shewing what the modern proceedings on this subject had been; in *Gordon v. Swan* (a), it was held, that on an agreement for the sale of goods where a certain day was appointed for payment of the price, interest did not run on the price from that day, Lord *Ellenborough* observing, that the giving of interest should be confined to bills of exchange, and such like instruments, and to agreements reserving interest. His Honour also referred to *Rigby v. Macnamara* (b), as one which very much resembled the present. In that case *Powell* and *Rigby* were jointly bound to *Drummonds* for payment of 90,000*l.* and by a counter-bond *Rigby* became bound to *Powell* in the penalty of 180,000*l.* conditioned for indemnifying *Powell*, his executors, &c. against all costs, damages, &c. he or they might sustain or be put unto on account of the non-payment of the 90,000*l.* and interest, or by reason of *Powell* having executed the former bond in anywise howsoever. *Powell's* executors having paid a large sum for principal and interest, the master allowed them interest on those sums only which they had paid in respect of the principal, but not on the sums which they had paid in respect of the interest, and on an exception to the master's report, Lord *Thurlow* was clearly of opinion that the master had done right in computing the interest only on the monies paid on account of principal, and that *Powell's* executors could claim no more against *Rigby's* estate than *Drummonds* could have done, and consequently could not have interest on the interest paid them. The surety therefore in that case was held not entitled to interest, although there was a penalty to cover it.

On these authorities his Honour held it to be clear that the present petitioner was not entitled to interest, and therefore that the master was right in disallowing his claim.

(a) 12 East 419.

(b) 2 Cox 415.

COOPER v. THORPE.

Rolls.  
Feb. 17, 23.

**B**Y act of parliament 9 G. 3. c. 51. "for dividing and inclosing certain open fields, lands, and grounds in the several townships of *Atterby*, *Snitterby* and *Waddingham*, in the county of *Lincoln*," reciting that within the township of *Atterby* in the parish of *Bishop Norton*, and within the several townships of *Snitterby* and *Waddingham* in the parish of *Waddingham*, were several open and uninclosed arable fields, common pastures, carrs, and waste grounds, or other open and common lands and grounds distinguished by several names, which contained in the whole 5000 acres or thereabouts: that *Robert Carter*, clerk, was rector of the parish of *Waddingham-cum-Snitterby*, and intitled to all the tithes great and small arising within the titheable places of that parish, and also to the tithes arising upon certain parcels of land lying dispersed in the open fields of *Atterby*; that *George Jollund*, clerk, was vicar of *Bishop Norton*, and as such intitled to all the rest of the tithes great and small, arising within the titheable places of the township of *Atterby*, and also to the tithes arising upon certain parcels of lands lying dispersed in the open fields of *Snitterby*:" It was enacted that "all the said open arable fields, common pastures, carrs, and waste grounds, or other open and common grounds in the said several townships, should be divided, set out and allotted" by commissioners, in such manner as after declared: that a survey and admeasurement of the lands directed to be

Where an inclosure act directed the commissioners to allot to the rector of the parish of *W.* so much of the lands to be inclosed in the township of *S.* and of the titheable parts of the township of *W.* as should (quantity, quality, and situation considered) be equal in value to two-fifteenth parts of the titheable places of the last-mentioned lands, in lieu of all tithes within the same lands, and that after the inrolment of the commissioners' award, all tithes within the lands directed to be inclosed, should cease; and the commissioners allotted to the rector certain parts of the lands in *S.* ex-

pressing them to be "in lieu of the tithes of the open fields in *S.* and *A.*" (not mentioning *W.*) and did not allot to him any part of the lands in *W.* in lieu of the tithes of *W.* but the allotment in *S.* exceeded in quantity two-fifteenth parts of the lands in *S.* inclosed under the act, but was much less in quantity than two fifteenth parts of the lands in *S.* and *W.* :—Held that the tithes of the lands in *W.* were extinguished by the act, even if there had been an error in not allotting any satisfaction for them; but that no such error appeared, as there was no evidence what lands in *W.* were titheable, nor in what manner the commissioners ascertained the value of the allotments or of the tithes.

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1818.  
  
 COOPER  
 v.  
 THORPE.

inclosed within the townships of *Atterby*, *Snitterby*, and *Waddingham*, and of the ancient inclosed lands in the townships of *Atterby* and *Snitterby*, "but not of *Waddingham*," which was to contain the numbers of acres in those several townships, and of each proprietor's respective share thereof, should be made and laid before the commissioners: and power was given to the commissioners and surveyor to enter upon and admeasure the lands directed to be inclosed within the townships of *Atterby*, *Snitterby*, and *Waddingham*, and the ancient inclosed lands in the townships of *Atterby* and *Snitterby*, but not any ancient inclosed lands in the township of *Waddingham*; that in case any doubt should arise concerning the claim of any of the proprietors, or any dispute between them concerning their interests in the lands to be inclosed, or the tithes arising upon the same, or the shares they ought to have in the intended division, the commissioners were required by examination of witnesses upon oath, and upon other proper and sufficient evidence, enquiry, and satisfaction, to determine the same; and such determination should be binding and conclusive to all parties.

The act further directed the commissioners, within six calendar months after such survey should have been laid before them, in the first place to assign and allot to *Carter* and his successors, rectors of the parish of *Waddingham-cum-Snitterby*, such parcel or parcels of the arable fields, common pastures, and carrs within the township of *Snitterby* (except the common pasture called the *Carr Side*) so directed to be inclosed, as should in the judgment of the commissioners, or any two of them, be equal in value to and a full satisfaction for the glebe lands of the rector within the last-mentioned lands to be inclosed: and then to assign and allot unto and for the said *Robert Carter* and his successors, rectors as aforesaid, such parcel or parcels of the residue of the same arable fields, common pastures, and carrs in *Snitterby*, and also of the titheable parts of the township of *Waddingham*, as should (quantity, quality, and situation considered) contain

or

1818.  
COOPER  
v.  
TARRANT.

or be equal in value to two full fifteenth parts of the titheable places of the last-mentioned lands and grounds, in lieu of and as a full recompence and compensation for all the tithes whatsoever belonging to the said rector, and arising within the same lands and grounds: and further to assign and allot to Carter and his successors such parcel or parcels of the arable fields of *Snitterby*, as the commissioners should (quantity, quality, and situation considered) adjudge to be equal in value to the tithes of the ancient inclosed lands in *Snitterby*: and then to assign and allot to *Jolland* and his successors, vicars of *Bishop Norton*, such parcels of the arable fields, common pastures, and carrs within the township of *Atterby* (except the common pasture called the *Carr Side*) as should, in the judgment of the commissioners, be equal in value to and a full satisfaction for the glebe lands of the vicar in the last-mentioned lands; and also to assign and allot to *Jolland* and his successors such parcels of the residue of the same arable fields, &c. in *Atterby*, as should (quantity, quality, and situation considered) contain or be equal in value to two full fifteenth parts of the same fields, in lieu of and as a recompence and compensation for all the tithes arising within the said arable fields, &c. of *Atterby* (except as before excepted), and then to assign and allot to *Jolland* and his successors, vicars as aforesaid, such parcels of the last-mentioned arable fields as the commissioners should (quantity, quality, and situation considered) adjudge to be equal in value to the tithes of the ancient inclosed lands in *Atterby*; and further to assign and allot to *Carter* (rector as aforesaid), and *Jolland* (vicar as aforesaid), such parcel or parcels of the said common pasture called the *Carr Side* pasture, as (quantity, quality, and situation considered) should contain or be equal in value to two full fifteenth parts of the titheable grounds therein contained, in lieu of and as a full compensation for all tithes whatsoever arising within the said *Carr Side* pasture, and respectively belonging to the said rector and vicar as aforesaid; which last-mentioned two-fifteenth parts should be divided between

1818.  
  
 Cooper  
 v.  
 Thompson.

between the rector and vicar, and their successors, in such manner and proportion as the commissioners should adjudge to be adequate in value to their respective shares and interests in the last-mentioned tithes: and moreover to assign and allot to the said rector and vicar, and their successors, such parcels of the residue of the said arable fields of *Atterby* and *Snitterby*, as in the judgment of the commissioners should (quantity, quality, and situation considered) contain or be equal in value to two full fifteenth parts of the lands lying dispersed in the arable fields of *Atterby* and *Snitterby*, the tithes whereof respectively belonged to the said rector and vicar, as a compensation for the last-mentioned tithes; which lands, so to be allotted as last expressed, should be divided between the rector and vicar, and their successors, in such manner and proportion as the commissioners should adjudge to be adequate in value to their respective shares and interests in the same tithes. The act then directed the allotment of the residue of the lands amongst the persons interested.

The act contained a clause, that the commissioners, in making the allotments of such parts of the lands as were lying within the carrs belonging to the said respective townships, should have regard more especially to the quantity, quality, and species of the lands belonging to each proprietor or party interested therein, and to the state and condition of such lands, with respect to drainage, at the time of the making of such allotments, by reason of the charge to which such allotments would be subject by the equal annual rate or assessment directed to be laid thereupon by act of parliament 7 G. S. for draining the lands within the level of *Ancholme* (of which the lands within the said carrs are part), and the allotments to be made to each proprietor or party interested in the carrs, should contain, as nearly as circumstances would admit of, the same quantity or proportion of dry land respectively as such proprietor or party interested was intitled to at the time of making such allotments, and as near as might be, in the same state, quality and condition, so that the several parts

parts and shares of the proprietors, or persons interested in the lands within the carrs, might not, after such allotments, be subject to the said annual rate or assessment in any greater or less proportion with respect to the value of each of the said shares, than the same were subject to at the time of passing the act; and that the commissioners, in making the allotments of the residue of the lands directed to be inclosed, should have regard to the situation and quality, as well as quantity, of the lands belonging to each person interested, and to the right of common and other property of every such person, and also to the situation and quality, as well as quantity, of the lands to be allotted in lieu thereof; and the share or shares to be allotted to each of the proprietors, of the residue of the said lands and grounds, should be allotted as near as conveniently might be to the messuages, cottages, or other lands or tenements belonging to the parties respectively.

The act further provided, that within six calendar months next after the commissioners should have completed the division and allotments, or as soon after as conveniently might be, they should form and draw up an award or instrument in writing, which should express distinctly and separately the quantity contained in the arable fields, common pastures, carrs and waste grounds, and the quantity and contents, situation, buttals and boundaries of the several parcels and allotments respectively by them set out and assigned by virtue of the act, and also the situation, buttals and boundaries of the respective townships of *Atterby*, *Snitterby*, and *Waddingham*; which award or instrument should be ingrossed on parchment, and signed and sealed by the commissioners, and should within six calendar months after the execution thereof be inrolled by the clerk of the peace for the division of *Lindsey*; and the several allotments and divisions to be made and declared by the award should be binding and conclusive unto and upon all the parties interested. " And immediately after the inrolment of the said award, all manner of tithes, ecclesiastical dues, duties, and payntents of what nature or kind

1813.  
COOPER  
t.  
TALOR



1818.  
  
 COOPER  
 v.  
 THORPE.

kind soever, arising, renewing, increasing, payable, or happening within or out of the said lands and grounds hereby directed to be inclosed, or within the said ancient inclosed lands or grounds, or otherwise howsoever, shall cease and be for ever extinguished."

It appeared that the lands inclosed under the act were 1532 acres 3 roods and 34 perches in *Snitterby*, and 1279 acres and 39 perches in *Waddingham*.

The commissioners, by their award duly inrolled pursuant to the act, awarded to the then rector of *Waddingham* 51 acres 1 rood and 32 perches of the lands in *Snitterby* inclosed under the act, as a compensation for his glebe lands and right of common on those lands as rector, and of the tithes of the ancient inclosed lands in *Snitterby*; and they further awarded to the rector 223 acres 1 rood and 32 perches of the lands in *Snitterby* "*in lieu of and compensation for all the tithes, dues, duties, and payments belonging to him within the open fields, common pastures and carrs of the townships of Snitterby and Atterby.*"

The commissioners also awarded to the then rector of *Waddingham* 51 acres 1 rood and 30 perches of the lands in the township of *Waddingham* inclosed under the act, in lieu of his ancient glebe lands and rights of common in the *North Carr*, *South Carr*, and *Carr Side Pasture*, and the *Acre Field* in *Waddingham*: but no other allotment whatever of any part of the lands in *Waddingham* was made to the rector.

The allotment of 223 acres 1 rood and 32 perches was more in quantity by 25 acres 3 roods and 24 perches, than two-fifteenths of the lands in *Snitterby* inclosed under the act, after deducting the allotment of 51 acres 1 rood and 32 perches for glebe and rights of common: and two-fifteenth parts in quantity of the lands in *Waddingham*, after deducting the allotment of 51 acres 1 rood and 30 perches for glebe and rights of common, would amount to 163 acres 2 roods and 33 perches.

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The bill was filed by the rector of *Waddingham-cum-Snitterby*, against the occupiers of lands in the township of *Waddingham*, inclosed under the act, for an account and payment of the tithes of those lands; the defendants by their answer insisting on the act of parliament and the award, as a bar to the plaintiff's right.

1818.  
COOPER  
v.  
THORPE.

*Mr. Bell* and *Mr. Shadwell* for the plaintiff, contended, that the tithes of these lands were not extinguished by the act, the award not having made any compensation for the tithes of *Waddingham*, but having expressly confined the compensation to the tithes of *Snitterby* and *Atterby*, and no allotment of any lands in *Waddingham* having been made to the rector, except as a compensation for his glebe and rights of common: that this was not such an award as the act had directed, and that the condition precedent on which the tithes were to cease, never having been performed, the right of the rector was not affected by the act.

*Mr. Hart* and *Mr. James Stephen* for the defendants, relied on the express words of the act as a complete bar to the plaintiff's right, even supposing the award to have been erroneous; and they contended that the error, if any, was only in expression, for although the award only expresses the allotment to be a compensation for the tithes of *Snitterby* and *Atterby*, yet the allotment exceeds the two-fifteenths to which the rector would have been entitled by the act, if the commissioners had merely intended a compensation for the tithes of these two townships. It is impossible to know exactly the rule by which the commissioners were regulated, for they were to take value, and not merely quantity, into their consideration.

*The MASTER of the ROLLS.* This is a bill by *Mr. Cooper* as rector, claiming tithes in kind, and having substantiated the facts of occupation of the lands in question  
by

Feb. 23.

1818.  
  
 COOPER  
 v.  
 THORPE.

by the defendants, of the plaintiff's being rector, and of the defendants' having had titheable matters on their lands, the rector has completely made out a *prima facie* right, unless the defendants meet it by a satisfactory answer. The answer they make is the act of parliament for the inclosure of the open fields in *Atterby*, *Snitterby*, and *Waddingham*; and they insist that this act is a complete bar to the tithes of these lands, for that by the terms of the act, from the inrolment of the award the tithes were for ever to cease: and that having made out the fact that the award has been made and inrolled, and that their's were lands inclosed under the act, the tithes are extinguished. The words on which the defendants rely are these; "that immediately after the inrolment of the said award all manner of tithes arising, increasing, payable, or happening within or out of the lands directed to be inclosed, shall cease and for ever be extinguished." This is offered as a parliamentary exemption of the lands in question; and when it appears that there was subsequently an award, and that these were part of the lands inclosed under the act, it seems *prima facie* to be a bar. But it is insisted on the part of the rector, not disputing that the award would have been a bar had it been such an award as the act provided, viz., had there been an allotment, yet that it ought not to be a bar because it is not such an award as the act intended; that a satisfactory compensation ought to have been made to the rector: that the act provided that two-fifteenths of the lands were to be the compensation: that on the face of the award it does not contain such an allotment of lands in quantity and description as is provided by the act. And in this case there are three distinct questions: First, whether the rector can go back and enquire into the competency of the award: and supposing he can, then, Secondly, whether he makes out satisfactorily that this is not such an award as the act intended, viz. that the allotments were not such as the rector was entitled to: and if both these propositions are made out, then, Thirdly, whether this was not to be an award binding and conclusive on the parties.

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Without at present agitating the first point, and assuming the plaintiff to be at liberty to enquire into the competency of the award,—Has he made out enough to impeach the judgment of the commissioners? It is clear that the commissioners entered on their duty; that an allotment was made to and accepted by the then rector; that it has been enjoyed by the rectors ever since; and that the subject of quantum was entered on and adjudged by the commissioners. In revising the judgment of any tribunal, a court is bound to presume *omnia rite et solenniter esse acta*, even if the revision takes place immediately, but more especially when it takes place after the lapse of half a century from the time when the judgment has been pronounced; and the person imputing error to it is bound to make out by clear and satisfactory evidence, that an error has been committed. In the present case, (supposing it to be competent to the rector to agitate the question) there is considerable difficulty and obscurity in the nature of the subject. This was a rectory peculiarly circumstanced. The parish of *Waddingham-cum-Snitterby* was contiguous to the township of *Atterby*, and the tithes of the latter belonged to the vicar of *Bishop Norton*, he and the rector of *Waddingham* having united rights in part of the lands: so that it was necessary for the act to provide an united compensation of two-fifteenths in the first instance, and afterwards a division.—In the next place, it appears in the description of the lands on the face of the act, that there had been a difficulty from part of the lands not being titheable. The ancient inclosures were not titheable, they were supposed to be covered by a *modus*, and they were to be left out of the act. The act constantly excepts them in making compensation, and whatever might belong to them, they were not to be included. Nor were all the uninclosed lands to be included, and two-fifteenths of the whole to be allotted; for the act says, “and also of the titheable parts;” having first excluded the ancient inclosures, it submits a further qualification, that it is to be only of the titheable parts  
of

1818.  
COOPER  
v.  
THORPE.

1818.  
  
 COOPER  
 v.  
 THORPE.

of the other; leaving to the determination of the tribunal constituted by the act, the question of what was titheable and what was not. But in setting out the two-fifteenth parts, value, and not merely quantity, was to be considered; and in a subsequent clause, the act, studiously calling the attention of the commissioners to this subject, speaks of dry lands, and looks to considerable variation in the value, in consequence of freedom from the rate or assessment for drainage. There is a section in the act for this very purpose. This complex subject was left to the consideration of the commissioners, and I agree that it was left to them without appeal; for it is provided that in case of any doubt or dispute concerning the rights in the lands to be inclosed, or the tithes arising upon the same, the commissioners are, by examination of witnesses or other proper and sufficient evidence, to hear and determine the same, "and such determination shall be binding and conclusive to all parties." The subsequent clause giving a right of appeal, contains an exception of the cases in which the order of the commissioners was to be final; and the award was to be conclusive as to the allotments to be made. There was clearly a power vested in the commissioners, of giving a final judgment on these points. I must presume that they exercised their authority properly, and that they were persons indifferently chosen; and I must give them credit for intending to adjudge fairly. It is clear that their attention had been called to the subject of the right to tithes, and that such questions were to arise before the commissioners. I must presume therefore that the then rector, attending to his own rights, and those of the church, called on the commissioners for a proper allotment. But it is said, first, that there was not a proper allotment, because the quantity was insufficient; and secondly, that it appears on the face of the award that nothing has been said of the tithes of *Waddingham*, and that therefore the rector had no compensation for the tithes of *Waddingham*.

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I have endeavoured to discover whether if we were now sitting to revise the judgment of the commissioners, we could arrive at the conclusion that this was not a proper allotment. On the face of the award nothing is said of the tithes of *Waddingham*, but the allotments to the rector are more in quantity than two-fifteenths if you leave out *Waddingham*. But if you do not, they are not equal to two-fifteenths in quantity. But it then comes to the question of value; and we have no evidence of the comparative value between the interests of the clergyman and of the occupiers. If quantity alone was to be the measure, there appears to be a deficiency; but at this distance of time how can it be known that it might not be made up by the difference in value? And supposing it were not, how can it be known what evidence was adduced in order to shew what land was titheable? If a large portion of land was shewn not to be titheable, there would be a great error in inferring a deficiency of quantity, without knowing how much was titheable, and how much was not. But if there was an error only in the description, and a full compensation was in fact made, a mere error in the description would not vitiate, if the rector had a full compensation, though it was not expressed to be for the tithes of *Waddingham*; for then in point of fact no injustice was done. In examining the subject at a distant period of time, there is much difficulty in finding out the data which governed the commissioners; we only know that a certain number of acres was allotted to and accepted by the then rector; that it has been enjoyed ever since; that the allotment has never been complained of till the commencement of the present suit; and that the plaintiff is now in possession of it. As to the first question therefore I am obliged to say, that I cannot be satisfied that the rector has made out that he has impeached the judgment by this tribunal at this distant period of time, or that there has been error, if the question had depended on that circumstance.

But I am clearly of opinion that there is no necessity to advert to that question; for even supposing that there was

1818.  
COOPER  
v.  
THORPE.

1818.  
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 COOPER  
 v.  
 THORPE.

error, and an omission of an allotment for the tithes, I am clear that the bar created by the act is an insuperable bar—an independent, substantive bar—not a conditional, but a positive, absolute, independent bar. It is provided that from a certain event the tithes are to cease. What is that event? The enrolment of the award. The tithes are to cease for ever. The argument of the rector on this part of the case has been, that the bar does not arise, if he can shew error in the *award*, viz. error in the *allotment*. But that does not follow. It is confounding two things which are quite distinct, the *existence*, and the *justice* of the award. But the act says that from the time of the enrolment of the award the tithes are to cease for ever. And the consequences would be alarming if this were not so. If it were to be considered that this vitiates and annuls the award, it cannot be null in this particular and good in other respects. The plaintiff must be able to say that there is no award. Unless he can shew that, the argument fails. The fallacy is, in saying that if he can shew error in the allotment, there is no award. If there is no award, there is no right in any one person to any of the various allotments in the whole of these 3000 acres; but every right remains precisely in the same situation as before the award was made. The consequence would also be, that if any one proprietor could shew an error in his allotment (whether he brought forward a claim or not) or that any one right was not compensated, the award is to be vitiated not merely *pro tanto*, but altogether; and this award, which was to be the *lex loci*,—every man's title,—and the binding rule for ever, is to be defeated by any individual who can point out an error.

These consequences are sufficient to overturn the arguments adduced on the part of the plaintiff; but the language of the act clearly does not warrant them. The allotment is to precede the award. The commissioners are to finish their allotments, and then to draw up their award. The award is to be the record of their judgments, the history of their proceedings. If it contains all this, it is their award, and the  
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tithes are to cease. Has there not been such an instrument, and has it not been recorded? It does not follow that if there be error in the allotment there is no award. From the time of the enrolment there is a total end of all right to tithes. It is clear that the fact of there being an award, decides it, whatever antecedent error there may have been.

Upon the whole, therefore, I am of opinion, first, that it is not competent now to examine into the merits of the award; secondly, that the rector does not make out any error in the allotments; and, thirdly, that if he did, it would not be sufficient to establish his claim; the award, and not the allotment, being the bar.

The consequence is, that the bill must be dismissed, but without costs. The plaintiff appears to have been but a short time rector, and may have been misled by the defendants' having at first submitted to pay the tithes. There is considerable obscurity in the language of the award, and an apparent deficiency of quantity. There is no imputation on the plaintiff, and it was a fair claim to bring forward.

Bill dismissed, without costs.

1818.  
COOPER  
v.  
THORPE.

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DUNNAGE v. WHITE.

ROLLS.  
Feb. 3, 20,  
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**DAVID LEWIS** by his will, dated 8th March 1802, devised to his nephew, *William Lewis*, in fee, certain freehold hereditaments at *Bourn End*, in the county of *Hertford*. He also devised to *Thomas White* and *John Letts*, in fee, certain freehold hereditaments in *Bearbinder Lane, London*, upon trust, to receive the rents and pay them to *Jane Hill*,

The court refused to carry into effect a deed between relations, dividing the property of a testator, under whose will they took in-

terests (one of the parties being also the heir at law and entitled to after-purchased lands), considerable benefits being given up by the heir without consideration; it appearing on the deed that the parties did not understand the extent of their rights; and there being evidence of the mental imbecility, habitual intoxication, and extreme ignorance of the heir at law; of his not understanding the nature of legal instruments, and of his having no professional adviser at the time he executed the deed; although no direct fraud or undue influence was proved, and the party acquiesced for five years.

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1818.  
  
 DUNNAGE  
 v.  
 WHITE.

during her life; and after decease, upon trust, to sell the same, and the produce of such sale to be equally divided and paid to and amongst his nephews, *William Lewis*, *John Lewis*, and *William Perks*, and his niece *Mary Nell*, in manner following:—Three-sixth parts to his nephews *William Lewis*, *John Lewis*, and *William Perks*; and to his niece *Mary Nell* one other sixth part: and as to the other two-sixth parts, upon trust, that his said trustees should invest the same in the public funds for the benefit of his nieces *Elizabeth*, the wife of *Daniel Dunnage*, and *Margaret* the wife of *John Atwell*, and the interest or dividends arising therefrom to be paid them equally during their lives, for their separate use; and after the decease of either of them the said *Elizabeth Dunnage* and *Margaret Atwell*, who should leave any child or children, then the interest or dividends due, or to become due, should be paid or applied in future for and towards the maintenance and support of such child or children during their minorities respectively: and upon all and every of their attaining the age of twenty-one, then the said stock so invested should be transferred to him, her, or them, or the survivors or survivor of them in equal shares and proportions as his, her, or their respective share or shares thereof. After giving some legacies, the testator gave, devised, and bequeathed all the residue of his estate and effects whatsoever, and wheresoever, and of what nature or kind soever, to the said trustees and executors thereafter named and appointed, upon trust, to sell and dispose of his household goods and stock in trade, and collect all debts owing to him, with all monies due and belonging to him upon mortgage, bond, &c. and should divide the same into six equal parts, and pay the same when so divided in manner following; viz. Four equal sixth parts thereof to his nephews *William Lewis*, *John Lewis*, and *William Perks*, and to his niece *Mary Nell*; and the remaining two-sixth parts thereof to invest in the public stocks or funds for the use, benefit and advantage of *Elizabeth Dunnage* and *Margaret Atwell*, and to pay and apply the interest and dividends

dividends thereof for their maintenance during their lives, in the same manner as was before directed concerning the two-sixth parts of the monies to arise from the sale of his freehold house in *Bearbinder Lane*; and from and after the decease of *Elizabeth Dunnage* and *Margaret Atwell*, to pay and apply the last-mentioned interest or dividends to or for the use of any child or children of *Elizabeth Dunnage* and *Margaret Atwell*, share and share alike, and to pay or transfer the funds to and amongst such child and children as therein before mentioned: and he appointed *White* and *Letts* executors.

1818.  
DUNNAGE  
v.  
WHITE.

Besides the real estates mentioned in his will, the testator at the time of its execution, was also entitled in equity to and in possession of about twelve acres of freehold and one rood of copyhold land at *Munden Dane End*; and after the execution of his will he purchased about seven acres of freehold land at *Munden Dane End*, and obtained a decree of foreclosure of some freehold messuages in the parish of *Christchurch, Spital Fields*, which had been mortgaged to him in fee.

The testator died unmarried, and without issue, on the 2d February 1809. He had only one brother, and that brother died in his life-time leaving issue two sons, *William Lewis* and *James Edward Lewis*. *William Lewis*, in May 1796, being then unmarried, entered as a seaman in the navy; in the August following he deserted from his ship then on the *Jamaica* station, and was never afterwards heard of, being supposed to have been lost on board a vessel which foundered at sea; and supposing him to have died in the testator's life-time, *James Edward Lewis*, his brother, was the heir at law of the testator at his decease; and supposing *William Lewis* to have survived the testator, and to have afterwards died without issue, *James Edward Lewis* was the heir at law of *William*, and thus became the heir at law of the testator; and *James Edward Lewis*, together with *Ann Lewis* his mother, were the next of kin of *William Lewis*.

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1818.  
  
 DUNNAGE  
 v.  
 WHITE.

The testator had not, at the date of his will, nor at the time of his death, any nephew named *John Lewis*, nor any nephew of the name of *Lewis*, except *James Edward Lewis*, unless *William Lewis* was then living. The testator had formerly a nephew named *John Lewis*, who died an infant twenty years before the date of the will.

The next of kin of the testator at his death, were his nephews and nieces, *James Edward Lewis*, *William Lewis*, (if living) *Mary Nell*, *Elizabeth Dunnage*, *Margaret Atwell*, and *William Perks*.

The interests therefore of *James Edward Lewis* in the testator's real and personal property when he executed the deed of the 26th February 1810, after mentioned, may be thus stated:—As heir at law either of the testator or of *William Lewis*, (supposing him dead) he was entitled in fee-simple to the whole of the property at *Bourn End*, *Munden Dane End*, and *Spital Fields*. He was also entitled as next of kin of the testator, if *William Lewis* died in his life-time, to one-fifth of the share of *William Lewis* of the testator's personal estate and of such part of his real estate as could be considered as converted into personalty; and as heir at law of the testator, or of *William Lewis*, to the whole of *William Lewis*'s sixth part of such of the real estate devised as was not converted into personalty; and if *William Lewis* survived the testator, *James Edward Lewis* was entitled, as one of the two next of kin of *William Lewis*, to one-half of his sixth of the personal estate and of the real estate converted into personalty:—supposing *James Edward Lewis* to have been the person intended to take under the description of the testator's nephew *John Lewis*, he was entitled in his own right to one-sixth of the produce of the sale of the house in *Bearbinder Lane*, subject to *Jane Hill*'s life interest, and to one-sixth of the general residue of the testator's real and personal estate: supposing *James Edward Lewis* not to have been the person intended to take by the description of *John Lewis*, but the gift of that one-sixth to have been void, or to have lapsed,—  
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then as one of the testator's next of kin he was entitled to one-fifth of that sixth as to the personal estate, and such real estate as could be considered as converted into personalty, and to one-half of another fifth, as one of the next of kin of *William Lewis*: and as heir at law of the testator or of *William Lewis*, he was entitled to the whole of that sixth as to any real estate not converted into personalty.

On the testator's death the trustees took possession of the property in *Bearbinder Lane*, and accounted for the rents to *Jane Hill*, during her life; they also took possession of all the rest of his real estates except the property at *Bourn End*, which *James Edward Lewis* entered into possession of soon after the testator's death. The trustees also possessed the personal estate of the testator and proved his will.

By indenture dated the 26th *February* 1810, between *Daniel Dunnage* and *Elizabeth* his wife of the first part, *John Atwell* and *Margaret* his wife of the second part, *Mary Nell* of the third part, *William Perks* of the fourth part, and *James Edward Lewis*, described as the brother and heir at law, and also one of the next of kin of *William Lewis* then supposed to be dead, of the fifth part; reciting the will of *David Lewis* and his purchase of the *Dane End* property subsequent to the making of his will, and that he did not afterwards republish his will, so that such hereditaments had descended to the testator's heir at law: that the said *John Lewis* departed this life some time in the life-time of the testator, and that *William Lewis* did, upwards of fifteen years ago, depart this kingdom and go to parts beyond the seas and was supposed to have been lost on board a vessel which foundered at sea; and that *James Edward Lewis* was his heir at law: and reciting (contrary to the fact) that *James Edward Lewis*, "*Elizabeth Dunnage, Margaret Atwell, Mary Nell, and William Perks,*" were his only next of kin: and that in order to prevent disputes and litigations between them the several parties thereto, respecting their several estates,

shares

1818.  
DUNNAGE  
v.  
WHITE.

1818.  
 DUNNAGE  
 v.  
 WHITE.

shares and interests in the testator's real and personal estates, so by him given and devised as aforesaid, and also of and in the testator's real estates which had so descended to his heir at law as aforesaid, it had been agreed that the whole of the testator's property from thenceforth, or when and so soon as the same or any part thereof should become payable or distributable, should be taken and held by the parties thereto, and by all persons interested therein in trust for them or any of them in such shares and upon the trusts, &c. after mentioned concerning the same, and that the parties had accordingly agreed to enter into the covenants thereafter contained :—It was witnessed that in pursuance of the agreement, *Dunnage* (for himself and his wife), *Atwell* (for himself and his wife), *Mary Nell*, *William Perks*, and *James Edward Lewis*, severally covenanted with each other, and the heirs, executors, administrators, and assigns of each other, that all the parties to the deed respectively, their respective heirs, executors, administrators, and assigns, and all persons interested in the premises as trustees or otherwise, for the benefit of the parties or any of them, should from thenceforth, and so soon as the same or any part thereof should be vested in, or payable, or distributable to or amongst the parties thereto or any of them, their, or any, or either of their executors, administrators, or assigns, stand and be seized or possessed of all the real and personal estate and property by the testator's will given, devised, and bequeathed as aforesaid; and also of and in the said pieces or parcels of land and hereditaments which had so descended to the testator's heir at law as aforesaid, and the monies, rents, issues, dividends, and profits arising and to arise therefrom (subject to the estate and interest of *Jane Hill* and her assigns in the premises in *Bearbinder Lane*, and the rents and profits thereof for her life, under the will) to the several uses, &c. after-mentioned, viz. :—as to the said messuage, and hereditaments at *Bourn End*, to the use of *James Edward Lewis*, in fee: and as to one undivided fifth part or share of all other the testator's real and

and personal estates and property thereinbefore respectively mentioned, as well those which passed by his will, as those which had descended to his heir at law, to the use of, or in trust for *James Edward Lewis*, his heirs, executors, administrators, and assigns, according to the respective natures and kinds thereof; and as to one other undivided fifth part or share of and in the same real and personal estates and property, to the use of, or in trust for *Daniel Dunnage* and *Elizabeth* his wife, their heirs, executors, administrators and assigns, according to the respective natures and kinds thereof: another fifth part was declared to be to the use of, or in trust for *Atwell* and his wife, their heirs, executors, &c.: another fifth part to the use of, or in trust for *Mary Nell*, her heirs, executors, &c. and another fifth part to the use of, or in trust for *Perks*, his heirs, executors, &c. in precisely the same words.

*James Edward Lewis* died on the 18th July 1815, having by his will dated 29th March 1815, given all his estate and effects to his wife *Abigail Lewis*, her heirs and assigns for ever, and appointed her sole executrix.

The bill was filed by *Daniel Dunnage* and *Elizabeth* his wife, and their only child, against *White* and *Letts*, the trustees in the will of *David Lewis*, *William Perks* (who was the heir at law and administrator of *Mary Nell*) *Abigail Lewis*, *John Atwell* and *Mary* his wife, and their children; praying that the will of *David Lewis* might be established, and the trusts performed: an account of his personal estate and of the rents and profits of his real estate devised and descended: that the trusts of the indenture of the 26th February 1810, might be carried into effect under the decree of the court: that the rights of the plaintiffs and defendants in the real and personal estates of *David Lewis* might be ascertained: that such parts of the testator's personal estate as remained unsold, might be sold, and the monies, together with such parts of the testator's personal estate as remained in the hands of the trustees undisposed of, might be paid and divided amongst the plaintiffs and the several other persons parties to the indenture of the

1818.  
DUNNAGE  
&  
WHITE.

1818.  
  
 DUNNAGE  
 v.  
 WHITE.

the 26th *February* 1810, or their representatives, in the manner, shares, and proportions mentioned in that indenture; and that the testator's real estates might be properly conveyed to the plaintiffs and the other persons parties to the indenture, and the heirs of such of them as were since dead, in such shares, &c. as therein mentioned: or otherwise that the testator's real and personal estates might be decreed to be conveyed and paid, or secured to, or for the benefit of the plaintiffs and such other persons as should appear to be entitled thereto, in such shares, &c. as the court should direct.

The bill stated, and it was admitted by the answers of all the defendants, that the name of *John Lewis* was inserted by mistake in the will of *David Lewis* for the name *James Edward Lewis*.

The defendant *Abigail Lewis*, by her answer, stated, that *James Edward Lewis* was a very ignorant man and very much addicted to liquor, and that he was prevailed upon to execute the indenture by fraud and imposition: that he was not at the time he executed the same, acquainted with his rights as a devisee and legatee under the will, and as the heir at law of the testator and of *William Lewis*: that he was when he executed the same, induced to believe that *Dunnage* and *Atwell*, and their respective wives, had absolute interests in the shares of the testator's residuary personal estate, and in the shares of the money to arise by the sale of the property in *Bearbinder Lane*, and could dispose thereof; and that *James Edward Lewis* executed the indenture under such belief: that he did not receive any consideration whatever for executing the indenture, and that he was not at any time during his life, called upon by the plaintiffs to carry it into effect:—and she submitted that the indenture ought not to be carried into execution, and that *James Edward Lewis* was not bound thereby.

The solicitor who prepared and attested the deed, deposed that the draft and afterwards the ingrossment of the deed were read and explained to *James Edward Lewis* before he executed it; that he was, previous to the execution, fully acquainted

quainted with and understood the true extent and nature of his rights "as a devisee and legatee under the will, and as the heir at-law of *David and William Lewis*," and the contents, effect, and operation of the deed: that he expressed himself satisfied with it:—that *James Edward Lewis* and *Dunnage* verbally gave the deponent instructions for the deed; that *James Edward Lewis* executed it without any undue or other influence; but that it was not perused by *James Edward Lewis* himself, or by any professional person on his behalf; that the witness had for six years known *Dunnage*, who had during that time occasionally been his client, but that he was but little acquainted with *James Edward Lewis* previous to the transaction in question, and had never been professionally employed by him.

Several witnesses who had many years known *James Edward Lewis*, deposed, that he was an extremely illiterate man, and in a very low station of life, having during several years been employed by victuallers in *London* as a pot-boy to carry out beer for their customers; that he was in the year 1810, and for several preceding years, in the habit of drinking to excess, and was almost daily in a state of intoxication; that he did not understand the nature of legal instruments, and that from his ignorance and imbecility of mind, he was a person very easily imposed on and influenced, and not competent to judge of his rights without professional assistance.

*Sir Samuel Romilly*, *Mr. Bell*, and *Mr. Girdlestone* for the plaintiffs; *Mr. Wilson* and *Mr. Shadwell* for defendants claiming under the deed of 1810. The objections to be made to the deed are, that it was obtained by fraud; that *James Edward Lewis* was ignorant of his rights, and that it is a mere voluntary deed which the court will not execute. As to the fraud there is no evidence whatever; *James Edward Lewis* lived five years after he executed the deed, without making any objection, and his devisee and executrix is the person who now seeks to impeach it. It is represented that he was a person

1818.  
DUNNAGE  
v.  
WHITE.



1818.  
  
 DUNNAGE  
 v.  
 WHITE.

a person incapable of executing a deed in consequence of his state of mind and dissipated habits. But the question is, whether he was in a condition to be competent to execute it at the time when it was actually executed. It is not shewn that he was not, or that he was subject to a general incapacity. He appears to have been a person of low habits, and much given to intoxication: but it should be shewn that he was intoxicated at the time, and even that alone is not sufficient, unless it be proved that he was drawn in to drink by the party to be benefited by the deed (a): but no evidence of that sort is adduced, nor any evidence of his general state of mind connecting itself with this transaction; on the contrary, there is the evidence of the solicitor who prepared the deed, that he was perfectly competent at the time, and understood what he was doing. But it will also be contended that this is a voluntary deed, and on that ground it will be attempted to be impeached. As to this court's not executing a voluntary deed, the leading authority is *Colman v. Sarrel* (b) a case which materially differs from the present, for in that case the deed amounted to a mere agreement by the grantor to transfer stock, and no actual transfer was ever made; but here the property was vested in trustees, and the parties agree in what mode a division shall be made among them. It is not a mere legal agreement, but an equitable division of the trust property. Supposing the legal estate in lands to be in *A. B.* in trust for five or six persons who enter into a covenant to divide the estate, and they mutually covenant that each shall be entitled to a certain number of acres, this instrument would be an effectual partition in equity. It is to be contended that although by this deed the property is actually divided, it is a mere voluntary agreement, and therefore we are coming into equity for a specific performance. But it is merely a declaration of trusts, and it must therefore be shewn that this court will not execute a voluntary declaration

(a) *Cooke v. Clayworth*, 18 Ves. 12.

(b) 1 Ves. jun. 50.

of trusts, the contrary of which was decided in *Ellison v. Ellison* (a), and the doctrine was carried still further by the late Master of the Rolls in *Sloane v. Cadogan* (b), where a party being entitled to a reversionary interest in a share of certain stock standing in the names of trustees, made a voluntary assignment of it to other trustees upon various trusts for the benefit of himself and his family; and it was objected that the plaintiff who claimed under that settlement, could not have any assistance from the court, on the ground that the settlement was voluntary; but his Honour held, that as against the party himself and his representatives, a voluntary settlement was binding; that the court would not interfere to give perfection to the instrument, but that a person may be constituted a trustee for a volunteer: that the fund was vested in trustees, the settlor had an equitable reversionary interest in it, and he had assigned it to trustees, and then the first trustees were trustees for his assigns: that they might come into equity, for that when the trust was created, no consideration was essential, and the court would execute it though voluntary. There is however, in the present case, a consideration such as the court will support. It is clear that parties may enter into a compromise of doubtful rights, though they thereby give up something they were entitled to. This appears from *Cann v. Cann* (c), and *Stapilton v. Stapilton* (d). An agreement on a supposition of right is sufficient, though it may appear that the right was on the other side. Taking that to be the law of the court, which has been recognised by subsequent decisions, the present case clearly falls within it. Here is a compromise of doubtful rights. The will of *David Lewis* gave the estate at *Bourn End* to *William Lewis*. That was agreed to be conveyed to *James Edward Lewis*, supposing him to be the heir. The *Bear-binder-Lane* property was given to the trustees to be sold, and the produce, together with the residue of the testator's property, were to be divided among six persons, but *James*

1818.  
DUNNAGE  
v.  
WHITE.

(a) 6 Ves. 656.

(b) *Append. to Sugden on Vendors and Purchasers*, 4th ed. p. 61.

(c) 1 P. Wms. 723.

(d) 1 Atk. 2.

*Edward*

1818.

DUNNAGE

v.

WHITE.

*Edward Lewis* was not named. He had no claim under the will, but it was agreed by this instrument that *James Edward Lewis* was the person meant by the name of *John Lewis*. This was a doubtful right, and a concession was made to him. When the deed was made, there was no evidence of the death of *William Lewis*, who was clearly a devisee, and also the heir at law of the testator. For the purpose of compromising these questions the deed was made: it contains an express recital that it was for the purpose of preventing litigation. There were clearly rights which might have been subjects of dispute, but they were compromised by all parties; and even supposing *James Edward Lewis* to have given up more than he ought, the court will not in considering a deed made for such a purpose, weigh with nicety the respective rights given up by each party; but when an arrangement is made in order to preserve the peace of the family, a very slight consideration is sufficient to support it. Another objection is intimated by the counsel for the defendant, that if the deed cannot be supported the bill must be dismissed: but it is clear that whatever may be the decision of the court respecting the deed, the plaintiffs are entitled under the will; and the only question is respecting the amount of their shares: the deed is engrafted on the will, making an alteration in the shares. On that point the court has no choice, for it is clear that the property must be sold and the produce divided.

Mr. Hart and Mr. Parker for the defendant *Abigail Lewis*. Independent of all other objections to this deed, it contains no contract nor any thing executory which the court has any jurisdiction to enforce. But *James Edward Lewis* received no consideration. He parted with a valuable interest and acquired nothing: the benefit was entirely on one side. It is evident not only that he could not have understood the deed, but that the solicitor by whom it was prepared, did not understand it although he professes to have explained it to *James Edward Lewis*. It is scarcely necessary to advert to the

the evidence of incompetency, for the deed itself shews he did not understand his rights : he appears however to have been a person who for the sake of a temporary relief, might have been prevailed on to do any thing. It is clear that every court would have presumed that *William Lewis* died in the testator's life-time, and that the *Bourn End* estate devised to him, became vested in *James Edward Lewis*. In limiting it to the latter, the deed gave him no benefit, and took nothing from the other parties ; for if they had insisted that it belonged to *William Lewis*, they could have derived no advantage ; it would merely have driven *James Edward Lewis* to his action of ejectment against the tenant in possession, in which he must clearly have recovered. As to the real estate at *Bourn End*, and the real estates descended, there was nothing which could have been litigated between these parties. As to the *Bearbinder Lane* property, and the personal estate, it is clear that *James Edward Lewis* was the person meant by the testator when he mentioned *John Lewis*, and that he was entitled in his own right to one-sixth of this property. If *William Lewis* survived the testator, his one-sixth of the real estate would vest in *James Edward* as his heir : if he did not, it would vest in him as the heir of the testator : and the share of *William Lewis* in the personal property would if he died in the testator's life-time, vest in the testator's five next of kin, of whom *James Edward Lewis* was one ; and if he survived the testator, it would vest in *James Edward Lewis* and his mother *Ann Lewis*, as the next of kin of *William*. So that supposing that event to have happened which was the least favourable to *James Edward Lewis*, viz. the death of *William* in the testator's life-time, *James Edward* would be entitled to one-fifth of the personal estate, and to the entirety of the real estate devised to *William Lewis*, and of the undevise real estate : and yet he is made to believe that a benefit is given to him when one-fifth of the real and personal property is agreed to be secured to him by this deed. It is clear that the rights of the parties were misunderstood ; for the deed

1818.  
  
 DUNNE  
 &  
 WHITE.

1818.  
  
 DUNNAGE  
 v  
 WHITE.

deed incorrectly recites that *Elizabeth Dunnage, Margaret Atwell, Mary Nell, and William Perks*, were three of the next of kin of *William Lewis*, and omits his mother *Ann Lewis*; it also treats the wives of *Dunnage* and *Atwell* as being themselves entitled under the will without mentioning their children.

Feb. 25.

*The MASTER of the ROLLS.* [After stating the prayer of the bill, and the will of *David Lewis*.] In this case two questions arise; First, whether the plaintiffs are entitled to have the deed of the 26th *February* 1810, carried into execution, and to have the property distributed according to that deed; and if not, then, Secondly, whether the bill is to be dismissed, or whether it is a bill under which the parties are entitled to have the property distributed in such manner as if the deed had not been executed.

It is insisted, first, that the parties have no right to call on a court of equity to have this deed executed, because it is seeking a decree to carry into execution a voluntary deed where there was no consideration to the principal party. Supposing that objection to be out of the question, it is said, that on the face of this instrument it is unreasonable; and that it was obtained from a person labouring under great imbecility of mind, by fraud and misrepresentation.

When the testator died, his nephew *William Lewis* had been long unheard of: he had entered as a seaman in the year 1796; all enquiries after him had been unsuccessful, and his family had long considered him dead. If *William Lewis* was out of the question, the real estate at *Bourn End* descended to *James Edward Lewis*, as the heir of the testator, if *William Lewis* did not survive him, and as the heir of *William Lewis* if he did survive the testator. The personal estate, and the produce of the real estate in *Bearbinder Lane*, were to be divided into sixths: and here there was some difficulty as to *William Lewis*; for if he died in the testator's life-time his share would go to the testator's next of kin, and if he survived the testator, it would go to the next of kin of *William Lewis*.

*Lewis.* There was another difficulty as to *John Lewis*. It appears that the testator had formerly a nephew of that name who died twenty years before the date of the will, and it seems to have been taken as a fact that this was a mistake, and that the testator meant *James Edward Lewis*, who was the son of a *John Lewis*, and brother of the deceased nephew: the plaintiffs state it in their bill as an agreed fact that *James Edward Lewis* was the person intended. If that was ascertained to be the intention, the only question was respecting the time of the death of *William Lewis*. There is little doubt that as the testator lived till 1809, and *William Lewis* had not been heard of since 1796, he must be considered as having died before the testator. At the testator's death it appears that *Jane Hill* was living; she enjoyed the rents of the *Bearbinder Lane* property during her life, and she was living when this bill was filed. Although the deed only notices the property of about seven acres at *Munden Dane End*, as being purchased after the date of the will, the bill represents that there was another estate to which the testator subsequently became entitled by a decree of foreclosure. He had also real estate which did not pass specifically by his will, unless under the residuary clause. *James Edward Lewis* took possession of the *Bourn End* estate, being the heir both of the testator and of *William Lewis*; and his widow is now in possession. The circumstances therefore of the family at the time when the deed was executed were these:—there was some doubt on one point, viz. the time of *William Lewis's* death; of the fact of his death there could be no doubt; and there was a high degree of probability that he died in the life-time of the testator. Was that material to *James Edward Lewis*? If he died in the testator's life-time, *James Edward Lewis* was the heir of the testator. If he survived, unless he made a will or left issue (of which there is no evidence) *James Edward Lewis* was of course entitled. In no event, therefore, did any beneficial interest pass to any other person. With regard to the personalty, the rights would depend on the

1818.

DUNNAGE  
v.  
WHITE.

1818.  
  
 DUNNAGE  
 v.  
 WHITE.

time of the death of *William Lewis*; if it happened in the testator's life-time, the testator's next of kin, viz. his nephews and nieces, would be entitled to *William's* lapsed portion of the residue. If *William* survived the testator, the next of kin of *William* himself would be entitled. There is a mistake in supposing that any of the parties to the deed (except *James Edward Lewis*) were entitled as next of kin of *William Lewis*; for he had a mother living, and she, together with *James Edward Lewis* were his next of kin: yet the deed represents *James Edward Lewis*, *Elizabeth Dunnage*, *Margaret Atwell*, *Mary Nell*, and *William Perks*, as being his next of kin. In this state of the family the deed was executed. As to the supposed absolute incompetency of *James Edward Lewis*, there is no satisfactory evidence. The solicitor who prepared the deed, proves, that at the time when it was executed, *James Edward Lewis* was not under any mental disability; there is no proof of his absolute incapacity at that moment, and as to any undue influence the evidence is exceedingly slight. But all the evidence is on one side to shew that he was a man of dissipated habits; addicted to excessive drinking; that he was almost constantly intoxicated, and that he was extremely illiterate; he had stepped into all this property though brought up in a very low station; and from his habits he was likely to be easily imposed upon. A person of this description is not under an absolute incapacity; but does not the instrument import that advantage was taken of him, and that he did not distinctly know what he was doing? The solicitor says he received instructions for the deed from *Dunnage* and *James Edward Lewis*; that the instructions were not in writing: he admits that he had been for six years the solicitor of *Dunnage*, but that he had no previous knowledge of *James Edward Lewis*, and had never been employed by him: and that no professional person was consulted on his behalf. In this situation a man of this description is made a party to this instrument. Does it appear that he was cognizant of his rights, and of the circumstances under

under which he was acting? On the contrary, it appears that the solicitor himself was not aware of these circumstances, for the deed certainly contains misrepresentations. Though it recites the will correctly in general, it omits to notice that the wives of *Dunnage* and *Atwell* were to have their shares for their separate use, and that those shares were afterwards to be in trust for their children; and the deed takes upon it to deprive the children of their shares entirely. After limiting to *James Edward Lewis* the *Bourn End* property, it directs that all the real estate shall be divided into five parts, of which one only is to belong to *James Edward Lewis*, another to *Perks*, and another to each of the nieces. In this way *James Edward Lewis* is made to give up, for nothing, four-fifths of the real estate descended to him, and in which none of the other parties could have any interest whatever. There was no question respecting his legitimacy, nor respecting his being the heir at law. He received no equivalent whatever; for as to the descended estates there could be no doubt. If the solicitor was acquainted with the property, why did he not introduce a recital particularizing all the real estate, instead of stating it to consist only of the seven acres at *Munden Dane End*? It was necessary for *James Edward Lewis* to know what it was that he was thus comprising in a sweeping clause. There is evidence therefore not only of imbecility and the want of a professional person to assist him, but that those around him kept him in ignorance respecting the property to which he was entitled.

As to the personal estate, if there was any doubt, the persons to protect him were the executors; the other parties could not do it. If *William Lewis* did not survive his uncle, *James Edward Lewis* himself was entitled in his own right to one-sixth, and as one of the testator's next of kin he was entitled to a fifth part of the lapsed share of *William*. Without any doubt therefore he would be entitled to precisely the fifth share he was to take under the deed. He therefore clearly took no benefit under the deed, and yet he gave up every thing by a sweeping clause.

1818.  
DUNNAGE  
&  
WHITE.



1818.

DUNNAGE  
v.  
WHITE.

It is said that the deed may be good if it is a settlement of family rights, according to *Stapilton v. Stapilton*, and *Cann v. Cann* (a). There is no doubt, if two parties, while the right remains doubtful, make a compromise, each taking his chance, it may be good. It was so in *Stapilton v. Stapilton*; there it was a doubtful question, and the court gave effect to the agreement. But independently of that, is this a proper deed for a court of equity to carry into execution? It is clear that he had not fair play. What was to become of the children? The parties had no right to join and exclude the children; yet the parents are by this deed taking to themselves absolutely what was by the will given to the children. It is true that they are now willing to cure it, but we must take the deed as it stood at the time. It is clear that the parties did not know what they were doing.

Upon the whole, considering the representations of this person's state of mind, of his circumstances, his habits; that he had recently acquired this property; and that the deed contains internal evidence of misunderstanding, I am of opinion that the court ought not to lend its assistance to carry it into effect.

It is said that the whole suit must fall if the deed is not established. But it is clear that the parties have a right to call for an account of the real and personal estate comprised in the will; and though they have unsuccessfully sought to have an account and distribution according to the deed, that circumstance does not affect their rights under the will: otherwise another bill must be brought in all respects similar. They have a right to an account under the will in the same manner as if the deed had not been executed:—but the bill must be dismissed with costs so far as it seeks to carry the deed into execution.

(a) See also on this subject *Cory v. Cory*, 1 Ves. 19. *Pullen v. Ready*, 2 Atk. 587. *Wycherley v. Wycherley*, 2 Eden, 175. *Kinchant v. Kinchant*, 2 Bro. C. C. 369. *Stockley v. Stockley*, 1 Ves. & B. 23.

## CARTER v. DEAN.

1818.

ROLLS.

Jan. 27.

Feb. 5.

**T**HIS was a bill by one of the executors of *Edward Pillbeam*, who died in *July* 1810, against his co-executors, and against the devisees of the real estates and the heir at law of the testator, alledging devastavits by the co-executors, and that actions at law had in consequence been commenced and judgments obtained by creditors of the testator against the plaintiff personally; and praying an account of the testator's personal estate possessed by the defendants, and that if it should appear that his general personal estate together with certain *leasehold* property specifically bequeathed, were not sufficient to pay his debts, his freehold estates might be declared to make good such deficiency, and be sold for that purpose:—alledging that the testator was at the time of his death a trader within the meaning of the bankrupt laws.

One who occupied lands for the purpose of keeping cows, the milk of which he sold, and when they ceased to yield milk, fattened and sold the cows and bought others for the like purpose; and who also sold calves, was held not to be a trader within the bankrupt laws.

It appeared in evidence that the testator at his death and for several years before, carried on the business of a cow-keeper, buyer and seller of cows and calves, and dealer in milk: that the place where he carried on his business was *distinct* from any other concerns in which he was engaged, and was exclusively appropriated to the business of a cow-keeper: that he generally kept up a stock of 20 or 30 cows, and was in the constant habit of buying and selling cows to keep a stock of that number in milk: that he was in the habit of buying grains, hay, and distiller's wash, as food for his cows: that he sold milk, and that such of his cows as became dry and yielded no milk were fattened by him and sold: that he did not carry on the business of a farmer, by ploughing land, and sowing, reaping, and selling corn; but that he occupied about 38 acres of meadow or marsh land for the purpose of his cows grazing thereon and of making  
hay

1818.  
  
 CARTER  
 v.  
 DEAN.

hay for them: that such land was connected with his business of a cow-keeper, and that he did not carry on any other trade.

The case having been argued by Mr. *Hart* and Mr. *Abercrombie* for the plaintiff, and by Mr. *Agar* and Mr. *Parker* for the defendants, stood for judgment.

Feb. 5.

*The MASTER of the ROLLS*, after stating that a question had been made whether the executor could extend the account to the real estate, observed, that if it should be determined that the real estate of the testator was not liable to his simple-contract debts, it would be unnecessary to decide the other question. In order to shew that his real estate is liable, it is necessary to prove that he was a trader within the meaning of the bankrupt laws. For this purpose witnesses are called, who depose that he was a cow-keeper; that he occupied thirty-eight acres of land, on which he kept cows; that he sold milk; that when his cows were no longer in a state to yield milk, they were fattened and sold for profit; and that this was a part of his trade. And the question is, whether this be a sufficient trading within the intent of the bankrupt laws? And I am clearly of opinion, that since the decisions in *Mills v. Hughes* (a) and *Bolton v. Sowerby* (b), (exclusive of *Ex parte Ledward* (c),) the question is no longer open. The point was in substance decided by the two former cases, and consistently with those authorities it is impossible to say that such a person dealing in cows and calves is a trader. It should be remembered that the statute (d) expressly provides that no farmer, grazier, or drover of cattle shall be deemed to be within any of the statutes relating to bankrupts. In the present case the party had 38 acres of land; in his other cha-

(a) *Willes* 588.

(b) 11 *East* 274.

(c) Stated by Mr. *Parker* from the following note of Mr. *Montagu*.

"Cow-keeping, by grazing the cows

"and selling the milk, seems not to be a trading. *Ex parte Ledward*, August 17, 1800."

(d) 5 G. 2. c. 30. s. 40. made perpetual by 27 G. 2. c. 16.

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acter he becomes a drover, for by a drover is not meant merely a person who drives cattle, but one who takes them to sell; one who buys and sells cattle; and the intention of the statute in uniting these three descriptions, was to exclude from the operation of the bankrupt laws, all persons falling within any one of the descriptions. The case in *Willes* was much stronger in favour of the party's being a trader than the present; for he had for the space of five years been buying and selling cows and calves; he was during the same period possessed of a farm of the yearly value of 35*l.* on which he kept a stock of milking cattle equal to a farm of that value, besides which he trafficked in cows and calves which were bought to be sold again in a course of merchandize, and not for the use of his farm, nor were they ever brought thither, but sometimes sold in the same markets where they were bought, or as soon as he could find persons to buy them. Here the testator had a farm and a stock of milking cows which he bought and sold, and so did the party in *Mills v. Hughes*; and yet after two arguments in the Court of Common Pleas, the judges finally were unanimously of opinion, that he was only a drover, and within the negative words of the statute. That case was followed by *Bolton v. Sowerby*, which also has a direct application to the present: there the party was more strictly a dealer in cattle than in this case; yet the Court of King's Bench was clearly of opinion that he was within the exceptions of the act, Lord *Ellenborough* observing, that his character of farmer and grazier would not protect him for any trading carried on ultra his business of farming and grazing, and collateral to the management of his farms; but that the question was, whether all the acts of buying and selling cattle, proved to have been done by him, did not come within the other description, that of drover, or whether every act not done by him as a farmer or grazier, were not done by him as a drover, and that the case in *Willes* was a strong authority in his favour. There is no pretence in the present case for saying that there was any other dealing than

1818.


  
CARTER
   
v.
   
DEAN.

1818.

CARTER  
v.  
DEAN.

than a dealing in cattle, and there was not more a dealing in cattle than in either of the other cases. This being the only ground for charging the real estate, I am clearly of opinion that the bill, so far as it regards the real estate, must be dismissed with costs.

ROLLS.  
Feb. 24.

### BATTERSBEE v. FARINGTON.

A voluntary settlement by one not indebted at the time, for the benefit of his wife and children, is good against future creditors, and in this case, on a bill by the wife, after the husband's death, the court established the settlement, without directing an enquiry whether there were any debts, the suit having depended five years, and no claim having been asserted by any creditor.

Whether a recital of articles before marriage, contained in a settlement after marriage is evidence of the existence of such articles as against creditors, *quære?*

THE bill stated, that in *October* 1793, a marriage was solemnized between the plaintiff and *Edmund Battersbee*, deceased, and that in contemplation thereof, articles of agreement, dated 1st *October* 1793, were executed between *Edmund Battersbee* of the first part, the plaintiff of the second part, and *William Sandford* of the third part; whereby *Edmund Battersbee*, in consideration of the then intended marriage, covenanted with *Sandford*, that in case the marriage should take effect, *Edmund Battersbee* would within three calendar months afterwards assure to the use of the plaintiff, in case she should survive him, an annuity of 500*l.* to commence from the day of his death, and to be payable to the plaintiff for her life, in bar of dower, and of all the plaintiff's claims to the personal estate of her husband under the statute of distributions, or otherwise.

The bill further stated, that the marriage was soon afterwards solemnized, and that after such solemnization, and in pursuance of the articles, an indenture dated 31st *December* 1793, was executed between *Edmund Battersbee* of the first part, the plaintiff of the second part, and *Sandford* of the third part; whereby, after reciting the articles, *Edmund Battersbee* in consideration of the marriage, and in pursuance and performance of the recited agreement, covenanted that *Edmund Battersbee*, in his life-time, or his heirs, executors, or administrators, within four months after his decease, in

case

case the plaintiff survived him, would transfer into the joint names of trustees, so much Government or *India* stock or annuities, or otherwise convey so much lands or hereditaments, as would secure to the plaintiff, in case she survived him, one annuity of 500*l.* during her life, in bar of dower, and of every other claim the plaintiff might be entitled to as his widow upon his estate either real or personal.

The bill further stated, that in *September* 1809, *Edmund Battersbee* being entitled to freehold and leasehold estates, determined to perform the articles and indenture, by conveying those estates to trustees, upon the trusts mentioned in the articles and indenture; but that on search being made, neither the articles nor the indenture could be found; and that *Edmund Battersbee* having forgotten what were the provisions contained in them, and conceiving that he had thereby agreed to secure to the plaintiff an annuity of 400*l.* during her widowhood, instead of an annuity of 500*l.* during her life, gave directions to his solicitor for preparing the necessary deeds to carry the articles and indenture into effect according to such erroneous idea: and thereupon indentures of lease and release were executed, dated the 12th and 13th *September* 1809, between himself of the one part, and the defendants *Farington* and *Vernon* of the other part, whereby *Edmund Battersbee* conveyed freehold and leasehold estates to *Farington* and *Vernon*, upon trust, at the request of *Edmund Battersbee*, during his life, or of the plaintiff, if she survived him, to sell the estates or raise by mortgage thereof, such monies as *Edmund Battersbee*, or the plaintiff, if living, should think proper: and to stand possessed of the money to be raised by such sale or mortgage, upon the trusts declared by another indenture of the same date: and in the mean time upon trust to permit *Edmund Battersbee* to receive the rents during his life; and after his decease upon trust out of the rents of the estates, to raise and pay an annuity of 400*l.* to the plaintiff during her widowhood; and subject thereto to stand possessed of the rents and profits in trust for the persons

1818.  
BATTERSBEE  
v.  
FARINGTON.

1818.

BATTERSBEE  
v.  
FARINGTON.

sons entitled to the interest of the trust monies under the indenture of the same date.

The bill further stated another indenture, also dated 13th *September* 1809, whereby the monies to be produced by the sale or mortgage of the estates were directed to be laid out in government or real securities, and the interest to be received by *Edmund Battersbee* during his life, and after his death, in case the plaintiff should survive him, the trustees were directed to appropriate so much of the trust monies as would produce the clear yearly sum of 400*l.* and to pay the income thereof to the plaintiff during her widowhood, in lieu of the 400*l.* provided for her by the indentures of lease and release before mentioned; and to assign the residue of the monies, and also (after the plaintiff's decease or second marriage) the part which should be appropriated as aforesaid, to his son *Thomas Battersbee*, to be vested in him at the age of twenty-one, if he should survive his father, and if he died under that age, or in his father's life-time, then to *Sophia Battersbee*, daughter of *Edmund Battersbee*, to be vested at her age of twenty-one; and in case of her death under that age, or in her father's life-time, then upon such trusts as *Edmund Battersbee* should appoint.

The bill further stated the will of *Edmund Battersbee*, dated 24th *September* 1809, whereby, after directing his debts to be paid as soon as conveniently might be after his death, and ratifying the settlement made by him for the benefit of the plaintiff, and of his two children, by the deeds of the 12th and 13th *September* then instant, and giving several legacies, including one of 1000*l.* to the plaintiff, and one of 5000*l.* to or in trust for his daughter *Sophia*; he gave the residue of his personal estate, and over which he had any power of disposition and appointment, to his son *Thomas Battersbee*, if and when he should attain the age of 21; but if he should die under that age then to his daughter *Sophia*, if and when she should attain that age, or be married with the consent of her guardians; and if she should die under that age

age and before marriage with such consent, then he bequeathed his said residuary estate to the said *Henry Farington*: and he appointed the plaintiff, together with *Farington* and *Vernon*, his executors.

1818.  
BATTERSBEE  
v.  
FARINGTON.

The bill further stated, that after the several deeds and will before mentioned had been executed, the indenture of the 31st December 1793 was found; but that the articles in pursuance of which the same was made were not then and had never since been found: and that *Edmund Battersbee* having discovered that the lease and release, and declaration of trust before stated, were not a performance of the articles, determined to execute a deed conformable thereto, and accordingly an indenture was executed by him on the 25th March 1812, between himself and the plaintiff of the one part; and the trustees *Farington* and *Vernon* of the other part, whereby, after reciting to the effect before stated, in consideration of the premises, and in pursuance and performance of the articles and indenture of the 1st October and 31st December 1793, it was declared, and particularly *Edmund Battersbee* did direct and appoint, that *Farington* and *Vernon* should be seised and possessed of the before-mentioned hereditaments, without prejudice to the trusts for sale or mortgage, and to the trust for the benefit of *Edmund Battersbee* during his life: upon trust after the decease of *Edmund Battersbee*, and during the life of the plaintiff, whether she should continue his widow or not, out of the rents and profits of the estates, or by sale or mortgage, to raise an annuity, of 500*l.* and pay the same to the plaintiff, in lieu of the annuity of 400*l.* and in satisfaction of the annuity mentioned in the articles; with a further direction that the trustees should appropriate such part of the trust monies mentioned in the former deeds as would produce a clear annuity of 500*l.* and pay the dividends or income thereof to the plaintiff, in lieu of the annuity of 500*l.* thereinbefore provided for her.

The



1818.  
  
 BATTERSBEE  
 v.  
 FARINGTON.

The bill further stated the death of *Edmund Battersbee*, in November 1812, leaving the defendant *Thomas Battersbee*, an infant, his heir at law, and also leaving his daughter *Sophia*, who in his life-time married the defendant *Sylvester Douglas Wilson*; and that the testator died seised of real estates not comprised in the settlements, and which descended to his heir at law.

The bill was filed on the 4th May 1813, by the testator's widow, against the trustees, and against the testator's son and daughter, the husband of the latter, and the trustees in their marriage settlement (whereby the testator had covenanted to bequeath 5000*l.* to the trustees upon various trusts for the benefit of Mr. and Mrs. *Wilson*, and their children) alledging that the defendants *Farington* and *Vernon* had with the plaintiff's consent, contracted to sell the estates comprised in the deeds of 1809; and praying an account of the real and personal estates of the testator at the time of his death, distinguishing the estates comprised in the deeds of 1809; an account and payment of the testator's debts, that the descended estates might be declared liable to his debts by reason of his having been a trader at his death, and that the assets might be marshalled: that the plaintiff might be declared to be entitled out of the monies to arise from the sale of the trust premises to have an annuity of 500*l.* paid to her, and if the interest of such monies should not be sufficient: then that a part of the said monies might be laid out in purchasing such an annuity as together with the interest of the residue of the monies, would make up a yearly sum of 500*l.*, and that she might be declared to have a specific lien as a specialty creditor upon the trust estates, and the produce thereof, to the extent of 500*l.* per annum; also praying that the rights of all parties might be ascertained, and the trusts of the will performed.

The defendants *Farington* and *Vernon*, by their answer, stated their ignorance as to the fact of any articles having  
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been executed before the marriage of the plaintiff with the testator; they admitted the execution of the other deeds, and that they had contracted for the sale of the estates, and received a deposit on account of the purchase-money; and they stated that the testator's personal assets were much less than sufficient to pay his debts, legacies, and funeral expenses.

1818.  
BATTERSEA  
or  
FARINGTON.

Sir Samuel Romilly, Mr. Cooke, and Mr. Collinson, for the plaintiff. The deeds of 1809 and 1812 were executed pursuant to articles previous to the testator's marriage with the plaintiff, and are consequently supported by a good consideration. The articles cannot be found, but there is no reason to doubt the fact of their having been executed; the recital in the subsequent deeds is evidence of their existence. In an anonymous case (a) very clearly and distinctly reported, a second marriage settlement was recited to be made in consideration that the wife had parted with the former settlement, which appeared to be made after the marriage, but was recited to be made in consideration of a marriage portion secured, but there was no proof of any previous agreement for such settlement; yet the court presumed it, and held the second not voluntary against bond creditors. And in *Dundas v. Dutens* (b), Lord Thurlow asks whether there is any case where in the settlement the parties recite an agreement before marriage, in which it has been considered as within the statute; clearly intimating his opinion that it would be evidence. On these authorities the recital in this case must be considered as evidence of the articles; and if so, there was clearly a previous agreement, on the faith of which the marriage took effect. But supposing the court to be of a contrary opinion on this point, yet this was a settlement made in favour of a wife, by her husband who was not in trade nor indebted. These facts may be assumed, for the

(a) *Pre. Cha.* 101.

(b) 1 *Ves. jun.* 196.

contrary

1818.  
  
 BATTERSBY  
 vs  
 VAREINGTON.

contrary is not proved. That a settlement for a meritorious consideration by one not indebted, is not within the statute(a), but is good against subsequent creditors, is established by many authorities. It was so held by Lord Kenyon in *Stephens v. Olive* (b), by Lord Rosslyn in *Montague v. Lord Sandwich* (c), by Sir W. Grant in *Kidney v. Coussmaker* (d), and by your Honour in the recent case of *Holloway v. Millard* (e). In this case there are creditors before the court but no objections to the settlement are raised by the answers; the application of the trust funds is objected to by none but the trustees who have long paid the annuity under the deeds. The court will therefore not deem it necessary to direct any inquiry into the fact of the settlor having been indebted at the execution of the settlements.

Mr. Horne and Mr. Temple for the defendants Mr. and Mrs. Wilson. There is no person on the record to contest the validity of the settlement. It is not alledged or proved by the executors that there were any debts at the time of its execution; the court therefore cannot speculate and conjecture that there may have been such debts. The settlement is good unless set aside in some suit by creditors, but in the present case there is no such suit.

Mr. Hart, for the defendants, the trustees in the settlement (who were also two of the executors of the settlor) suggested the propriety of an inquiry before the master as to the fact whether the settlor was indebted when he executed the settlement. There is no evidence of any articles. It is new doctrine that a recital in a post-nuptial deed is evidence of ante-nuptial articles: it may undoubtedly form part of the evidence. On an inquiry before the master much evidence

(a) 13 Eliz. c. 5.  
 (b) 2 Bro. C. C. 90.  
 (c) Cited 12 Ves. 148, from the  
 decree.

(d) 12 Ves. 136.  
 (e) 1 Madd. 414.

might be obtained, and the plaintiff might be examined on interrogatories. If there had been previous articles, it seems inconsistent that the settlor should have executed the deed of the 31st *December* 1793, by which he did nothing more than he had already done by the supposed articles. The deed of 1809 raises a strong inference that the settlor was indebted at the time of its execution, for it is made a short time before his death, and it conveys a considerable portion of his property in trust for sale.

1818.  
BATTERSBEN  
v.  
FARINGTON.

*The MASTER of the ROLLS* said, that if the fact be established that the settlor was not indebted at the time, and there was no fraud, the settlement would clearly be good against future creditors. That forms the distinction between the two statutes (a). The first question which has been made, I should not venture to decide. A recital is good evidence against the party himself, but I apprehend not against creditors or third persons: that would lead to great inconvenience, for every trader might execute a deed containing such a recital. It is evidence against the party making it, and those claiming under him. The question would be, whether he could have any object in representing himself to have executed the prior articles. There is nothing to impeach the truth of it as against himself or persons claiming under him. The trustees have not in this case suggested by their answer that there were any debts. If any creditor had discovered that the property was about to be administered, he would in all probability have filed a bill. Though this be a voluntary settlement, yet being without fraud, and by a person not indebted at the time, the court cannot but declare its validity.

(a) 13 *Eliz. c. 5.* & 27 *Eliz. c. 4.*

Feb. 12, 1818.

## REDFEARN v. SOWERBY.

The court will not order the representatives of a deceased solicitor to deliver the papers in a cause to another solicitor, unless the client will pay what is due to the representatives. It seems the court will interfere against a solicitor's representatives in the same manner as against the solicitor himself.

**M**R. *HART* moved that the administratrix of a deceased solicitor might deliver over the papers to another solicitor, for the purpose of preparing briefs in an appeal which was expected shortly to come on for hearing, but without prejudice to any lien, and on an undertaking to restore the papers: but no offer was made to pay the administratrix what was due to her for the business transacted by the intestate.

*Mr. Joseph Martin* for the administratrix, opposed the motion, on the ground that although the court had jurisdiction over a solicitor to compel the delivery of papers, that jurisdiction did not apply to his representative: and that in all events, the lien of the solicitor's representative ought to be satisfied.

*Mr. Hart*, in reply, observed, that the court had jurisdiction not only over the solicitor, who is its own officer, but over all those who through him have obtained possession of the papers, knowing them to be the papers in the cause: and that the undertaking to re-deliver the papers rendered it unnecessary to satisfy the demand of the administratrix, and that she would still have a lien on the fund to be recovered.

*The LORD CHANCELLOR* said, he did not recollect an instance of such a motion as the present, but that there must be some way of getting at it. When a party says that his solicitor shall not go on, it is in vain for him to ask for the papers, without paying the solicitor what is due to him. The question here is respecting the representative of the solicitor,  
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and where there is a disqualification from going on, which has arisen from the act of God, and whether you must not pay to the representative all that is due to her? A client turning off his solicitor, cannot say that he shall look only to the fund in the cause. I should be sorry to say the court cannot interfere against the representatives of a solicitor, but I think the party cannot take the papers without paying to the representatives what is due.

Motion refused.

NESBITT v. MEYER.

**T**HIS was a bill for the specific performance of an agreement for a lease from the plaintiff to the defendant, of a house and lands at *Norwood*, for three years from *February 1814*. The bill was filed on the *30th July* in that year, but the cause did not come on to be heard till the *24th February 1818*, consequently after the term was expired. The bill charged, that the defendant had cut down a number of timber and ornamental trees, and prayed that he might be decreed to accept a proper lease, and execute a counterpart: it also prayed an account of the trees cut down, and that the defendant might pay the value to the plaintiff.

The defendant did not by his answer deny the agreement, but stated that the plaintiff had not put the premises into repair, and he also objected to some of the clauses contained in the draft of a lease which had been prepared. It appeared in evidence, that the defendant had cut down about 80 poles or young oak trees after notice on the part of the plaintiff not to cut them; but that they had all been used in repairing the paling and fences on the premises agreed to be demised, and that their value was not more than between three and four pounds.

VOL. I.

H

Mr. Bell

1818.

REDPEARN  
v.  
SOWERBY.

ROLLS.  
Feb. 24, 25,  
April 14.

The court dismissed a bill for the specific performance of an agreement for a lease by the plaintiff to the defendant, the term having expired before the hearing, and certain acts of waste committed by the intended lessee while in possession, being so trifling, that a jury would have given merely nominal damages. As to the general principle respecting the court's decreeing a specific performance of an agreement for a lease where the term expires before the hearing, *quæritur*.

1818.  
  
 NESBITT  
 v.  
 MEYER.

Mr. *Bell* and Mr. *Shadwell* for the plaintiff, contended, that although the term was expired, the court would decree the agreement to be performed as nearly as might be, and that there were many instances in which the court had directed instruments to be framed for the purpose of affording the party a remedy by action at law : that otherwise the greatest injustice might happen, for a party might enter under his contract, commit acts of destruction, and by protracting the hearing of the cause, deprive the other party of all remedy. The plaintiff in this case has sustained an injury, and the court will put her in a situation in which that question may be tried.

Sir *Samuel Romilly* and Mr. *Heald* for the defendant. It is clear that the court cannot make any decree for a specific performance in this case by referring it to the master to settle a lease to the defendant for a term which has expired. In a very recent case of *Weston v. Sim*, before Sir *W. Grant*, the term had expired before the hearing, and the bill was dismissed, although it was much insisted that a lease ought to be executed as a foundation for an action of covenant. Unless the plaintiff can shew that covenants must have been introduced into this lease on which the plaintiff could have brought actions, she cannot succeed. The court can always direct an action to be brought; and in cases of waste, there is a remedy either by an issue or a reference to the master. Here the plaintiff has expressly prayed an account of the trees cut; an action at law therefore is unnecessary, and it is irreconcilable with the relief prayed by the bill.

Feb. 25.

*The MASTER of the ROLLS.* In this case the plaintiff would originally have been entitled to a reference to the master to enquire whether the lease of which a draft has been prepared, was proper, and to a reference to settle a proper lease; but the term for which it was to have been granted is now expired. And the question is, what a court  
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of equity is to do in the specific performance of an agreement for a lease when the term is expired? This question is stated to have come before the late Master of the Rolls in the case of *Weston v. Sim*. I have seen the decree in that case. The pleadings are exactly like the present. It was insisted that the court should antedate the lease in order to give the parties an action for breach of covenants. I do not know in what terms the bill was dismissed, but the Master of the Rolls did in fact dismiss it. I am not prepared however to say, that there may not be cases, in which, though by inevitable accident, or the accumulation of other business before the court, the term may have expired before the hearing, and in the interval, important rights have arisen, the court would not have power to antedate the lease, and prevent the party from availing himself of that circumstance as an objection to any proceeding at law. But this is not such a case; for the only object the court could attain here, would be the encouragement of litigation. It would be to permit an action to be brought for the conduct of the defendant while in possession. If there ever existed a case in which such a proceeding ought not to be encouraged, it is the present. There is the testimony of one witness as to the fact of cutting down the trees: it is the evidence of the person who was employed to cut them down, and he deposes that they were employed in repairs upon the premises. The premises are represented, and indeed proved, to have been in complete repair, except as to the inclosures and fences, and the witness had been previously employed by the plaintiff to cut down poles for the purpose of repairs. The defendant was certainly imprudent in not first applying to the plaintiff; but he left it to the witness, who cut down poles amounting to about three pounds in the whole, and they were employed in putting into repair the fences of the plaintiff. I do not say that an action might not have been maintained; but in all probability a jury would not have given more than sixpence damages, so that if the plaintiff should be sufficiently ill advised, it clearly

1818.  
NEABITT  
v.  
MEYER.



1818.  
  
 NESBITT  
 v.  
 MEYER.

would not be worth her while to bring an action. This being the only injury sustained, and the only thing in respect of which it is contended that the court ought to decree the execution of a lease, I will not do so much hardship to the plaintiff as to induce her to bring an action.

Bill dismissed, without costs.

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April 14.

The cause was afterwards spoken to again on the subject of costs, and it was contended on the part of the defendant that the bill ought to be dismissed with costs: but his Honour observed, that the plaintiff had lost the opportunity of obtaining a decree not by any fault of her own, but merely in consequence of the other business of the court having prevented the earlier hearing of the cause; that the principal point on which expence had been incurred, and evidence gone into, was on account of the defendant having taken on himself to cut down trees, which he was not warranted in doing without a previous application to his landlord: and his Honour remained of opinion that the bill ought to be dismissed without costs.

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Rolls,  
 Feb. 25, 26.

### MORPHETT v. JONES.

Specific performance decreed of a parol agreement for a lease, though denied by the answer, on the evidence of one witness confirmed by circumstances; and followed by acts of part performance, such as taking possession, and making improvements.

THE bill stated that in *October* 1809, a treaty was entered into between the defendant *Jones* and *Robert Morphett* the elder (the plaintiff's father) on the plaintiff's behalf, touching the granting a lease of the lands specified in the authority after-mentioned, and that *Jones* agreed to grant to the plaintiff a lease thereof for twenty-one years to commence from *Old Michaelmas Day* 1809, at the yearly rent of 400*l.* and that *Robert Morphett* the elder, on the plaintiff's behalf, agreed to accept a lease of the premises upon the terms aforesaid; and that *Jones* in part performance of the agreement,

agreement, wrote and signed an authority in writing to the following effect :—" *London, 7th October, 1809.—To Robert*

1818.  
MORPHETT  
v.  
JONES.

" *Morphett, Esq.—I hereby authorise you to enter the under-mentioned lands as tenant on Wednesday next the 11th instant, being Old Michaelmas Day:—*

" *Scotney near Lydd, Brackenbury, Looker.*

" *Goose New Romney, James Chittenden, do.*

" *Crooked Elms Newchurch, } John Chittenden, do.*

" *Pillrags do. }*

" *Crumpp Field St. Mary's, — Hoy, do.*

" *Corner Field New Bridge, Jacob Wratten, do."*

(Signed) J. G. Jones."

The bill further stated, that the plaintiff, in pursuance of the agreement and the written authority given in part performance, entered into possession of the premises as tenant to the defendant *Jones*, on the 11th *October* 1809, and continued in possession of the whole till *Old Michaelmas* 1810, and paid the yearly rent of 400*l.*, allowance being made thereout of such sums as the plaintiff was entitled to be allowed.

The bill further stated, that in *March* 1810, the defendant *Jones* was desirous of selling those parts of the lands which were situate in and near *Newchurch, St. Mary's, and East-bridge*, and communicated his desire to the plaintiff or his father by a letter, in which, after alluding to his having occasion for a sum of money, he expressed himself as follows:—

"The only way I have of meeting it is by selling part of the land. I know of several persons who would become purchasers, but I wish to give you the first offer of the whole or any part you may choose. I shall be inclined to take of you a fair price, inclining to your advantage. The pieces are, the *Pillrags*, 36 acres; *Crooked Elms*, 16; *Crumpp Field*, 8; *Corner Field*, 10:—you have certainly my promise of a lease, from which I should be ashamed to swerve; but should you not purchase any part of the land, you see to what disadvantage

1818.  
  
 MORPHETT  
 v.  
 JONES.

vantage I must sell it. I shall be happy to give you the accommodation on the *Goose and Lydd* land so as to make up the term that was to be granted on the whole, or to make a deduction that may appear fair between us, or if it is more to your interest I will execute the plan first intended, *that of a lease on the whole.*"

The bill further stated, that several meetings took place between the defendant *Jones* and the plaintiff's father on the subject of the intended sale, and it was at length finally agreed that the plaintiff should give up the land in and near *Newchurch, St. Mary's, and Eastbridge*, specified in the letter, and should continue tenant of the residue (being the lands in and near *New Romney and Lydd*, call the *Goose and Lydd* land) for the residue of the term of 21 years to be granted by lease, at the reduced yearly rent of 150*l.* to commence from *Old Michaelmas Day* 1810.

The bill further stated, that after the defendant *Jones* had contracted for the sale of the land mentioned in the letter, he requested the plaintiff to give up a piece of land, part of the *Goose Land*, and in lieu thereof to retain possession of the piece called the *Corner Field* (part of the land before agreed to be given up) with which the plaintiff complied, and yielded up all the land agreed to be given up, viz. the *Pillrags, Crooked Elms, Crumy Field*, and 11 acres of the *Goose Land*, and continued in possession as tenant at the reduced rent of 150*l.* a year, of the residue, consisting of the *Corner Field* and the *Goose and Lydd* land, except 11 acres of the *Goose* land given up.

The bill further stated, that the defendant was in *November* 1810, desirous of purchasing the plaintiff's interest in the last-mentioned lands, and communicated his desire to the plaintiff's father in a letter, dated 2d *November* 1810, in which after adverting to some purchases of land he had lately made, and his consequent occasions for money, he expressed himself as follows:—"The only resource left me is to dispose of such part of my property as I may deem less likely to increase in value,

value, and surely the marsh land is considered in this state. It therefore remains for me to offer you a consideration *for the time you have in it*, and I trust such a one as you will think liberal, for I wish to make no other than a handsome compensation, which I feel I am bound to do as well for the inconvenience of your son's leaving the land, as for the numerous obligations I lie under to you, which I ever have and shall feel grateful for. But to the point—I am willing to allow you the rent of the present year, and that up to *Michaelmas* 1811, on condition of your giving me at that time possession of the land; and I also engage to continue it to you after that period in case I do not sell it, or that *Fenner* does not join in the recovery, in which case I cannot make a title.” —“ I have suspended for the present the draft of the lease until your decision is known.” —“ If it should not meet your approbation, you will find me not swerve from what I have ever appeared true to,—my word. I must then sell under the greatest disadvantage, which you are well sure of; I am so well convinced of your liberality and of your wish to serve me, that I think you will allow the compensation equal to the sacrifice.”

1818.  
  
 MORPHEET  
 vs  
 JONES.

The bill further stated, that this proposal was not acceded to on the part of the plaintiff; and after stating improvements made by the plaintiff on the premises, applications by him for a lease, a notice to quit given to him by the defendant, and a contract for sale by the latter to the other defendant *Pepper*,—prayed that the agreements, so far as the former was not altered by the latter, might be specifically performed; that the defendant *Jones* might be decreed to execute to the plaintiff a proper lease of the marsh land in and near *New Romney* and *Lydd*, called the *Goose* and *Lydd* land, and *Corner Field*, in the plaintiff's occupation, for 21 years, at the yearly rent of 150*l.*, and for an injunction.

The defendant *Jones* by his answer admitted, that in *September* or *October* 1809, the defendant entered into a treaty with

1818.  
  
 MORPHETT  
 v.  
 JONES.

with *MorpheTT* the elder on the plaintiff's behalf, touching the granting a lease of the lands as afterwards mentioned, but not otherwise, viz., that the plaintiff wishing to become the tenant of the lands, it was proposed and agreed generally between the plaintiff and *MorpheTT* the elder on the plaintiff's behalf, that the plaintiff should become such tenant; but that nothing was said as to any lease or term of years for which he was to hold the same, except that in the course of the treaty the defendant promised generally to grant him a lease, but he denied that any duration, or the commencement, or termination, or rent of any lease was ever settled and agreed upon or mentioned: and he denied that he ever promised a lease of the lands for a term of 21 years or any other period, or that the rent to be paid should be 400*l.* a year; but that it was originally proposed and agreed that the plaintiff was to become tenant on the terms to be settled by a mutual friend, who valued the lands at 3*l.* per acre, amounting in all to 450*l.* a year. The answer admitted the written authority of the 7th October 1809, and the several letters mentioned in the bill, but insisted that the former merely authorised the plaintiff to enter as a tenant from year to year: it also admitted the fact of the plaintiff's taking possession, and of his afterwards giving up the lands called *Pillrags*, *Crabbed Elms*, *Crump Field*, and 11 acres of the *Goose* land, and of his continuing tenant at the rent of 150*l.* of the residue, viz. *Corner Field* and *Goose* and *Lydd* land, except 11 acres of the *Goose* land, given up as mentioned in the bill. The defendant claimed the benefit of the statute of frauds (a), and denied that the plaintiff had expended any money on the premises, except for cleansing ditches, and which he was bound to do as a tenant from year to year.

The plaintiff gave in evidence a receipt from the defendant to the plaintiff, dated 19th *February* 1811, for 400*l.* for rent to *Michaelmas* preceding, and several subsequent receipts for the reduced rent of 150*l.*

(a) 29 Car. 2. c. 3.

*Robert Morphett* the elder, (the plaintiff's father) deposed, that some time before *Old Michaelmas* 1809, he entered into a negotiation with the defendant for a lease to be granted by the defendant to the plaintiff, of the whole lands mentioned in the bill for 21 years, under a rent to be fixed by one *Martin*; and that about *Michaelmas* 1809, it was finally settled and agreed between the defendant and the witness, that the defendant should grant such lease to the plaintiff for 21 years to commence on the 10th *October* 1809, at the yearly rent of 400*l.*, *Martin* having previously set the rent at 457*l.* but the defendant and the witness considering it too high, the defendant agreed to abate 57*l.*: he further proved the facts of the taking possession of the premises; that the plaintiff continued in possession of the whole and paid the rent of 400*l.* up to the 10th *October* 1810:—that about *Michaelmas* 1810 the plaintiff at the request of the defendant gave up the possession of the *Crooked Elms, Pillrags, and Crump Field*, and 11 acres part of the *Goose* land, and that it was agreed between the defendant and the witness that the plaintiff should pay to the defendant the yearly rent of 150*l.* for the residue of the lands, during the remainder of the term of 21 years for which it had been agreed by the defendant that he should let the whole lands to the plaintiff as before stated:—that the plaintiff from the 10th *October* 1810, to the 10th *October* 1815, paid to the defendant the rent of 150*l.* for the lands called *Scotney and Corner Field*, and part of the *Goose* land, of which the plaintiff had ever since been in possession; and that the rent was so paid under the contracts between the deponent, on the plaintiff's part, and the defendant. The same witness also deposed, that the plaintiff had expended on the lands remaining in his possession about 100*l.* in improvements, which were not usual for a tenant from year to year to be at the expence of, and that those improvements were made in expectation that the defendant would grant the plaintiff a lease for 21 years.

1818.  
MORPHETT  
v.  
JOHN.

*John*

1818.  
  
 MORPHEIT  
 v.  
 JONES.

*John Morris* deposed, that on the 2d November 1810, at the request of the plaintiff's father, he informed the defendant that the plaintiff could by no means comply with the defendant's request contained in the letter of the 2d November 1810, (relative to giving up possession of the remainder of the lands), and that the defendant said in reply, "that the plaintiff should have the lease; that it would be better for the plaintiff, but worse for the defendant, for that he must sell the land, and that he had told Mr. *Morphett* so in the letter."

Mr. *Bell*, Mr. *Roupell*, and Mr. *Sugden*, for the plaintiff. It is the clear law of the court, that delivery of possession under a parol agreement, is such an act of part performance as will prevent the application of the statute of frauds (a). That has been established ever since Lord *Aylesford's* case (b). The act of taking possession must refer to some subsisting agreement; it is a much stronger act of part performance than the payment of money under a parol contract for purchase; for no one can enter on a farm without considerable expenditure before he can have the beneficial enjoyment of the property. The rule laid down by Lord *Redesdale* in *Clinan v. Cooke* (c), is, that nothing is a part performance which does not put the party into a situation, that it is a fraud upon him unless the agreement is performed; for instance, if upon a parol agreement a man is admitted into possession, he is made a trespasser, and is liable to answer as a trespasser if there be no agreement. And in the more recent case of *Gregory v. Mighell* (d), Sir *William Grant* considered, that as the plaintiff had no other title to possess the land, his title was *prima facie* to be referred to the agreement; that the defendant was not at liberty to say it was a possession that had no reference to the agreement; and that he could not be per-

(a) 29 Car. 2. c. 3.  
 (b) 2 Str. 783.

(c) 1 Sch. & Lefr. 41.  
 (d) 18 Ves. 333.

mitted to say the plaintiff had been possessing merely as a trespasser. In the present case there is a further act of part performance, viz. the delivering up by the plaintiff to the defendant of part of the lands comprised in the original agreement. But it will be contended, that there is but one witness who proves that there was any agreement for a lease for twenty-one years, and that his evidence is not sufficient to warrant a decree against the oath of the defendant. Though it is admitted as a general rule, that the court will not make a decree upon the evidence of a single witness in opposition to the defendant's positive denial by his answer, yet there is an exception in cases where there are circumstances giving greater credit to the witness. The rule and the exception are stated by Lord Eldon in *The East India Company v. Donald* (a), one of the latest cases on this subject, where the former authorities were examined; and in that case his lordship decreed against the defendant upon the testimony of one witness as to facts positively denied by the answer. In the present case there are strong circumstances of confirmation. It is clear that the defendant had promised a lease; this appears distinctly both from his own letters and from the conversation proved by *Morris*. One of the letters agrees to grant a lease of the remaining land for "the same term" as that which was to have been granted of the whole: he also speaks of having suspended the draft of the lease: and on the 2d November 1810, he writes a letter, requesting the plaintiff to give up possession at *Michaelmas* 1811, and offering to allow him a consideration for the time he had in the lands, clearly shewing he did not consider him a mere yearly tenant, but a person who had a permanent beneficial interest in the property: otherwise he might have given him notice to quit, and obtained possession without making any terms with the plaintiff. The answer of the defendant is not a direct and positive denial, therefore one witness is sufficient: but supposing it to be

1818.  
MORPHETT  
v.  
JONES.

(a) 9 Ves. 275.

positive,



1818.  
 MORPHEIT  
 v.  
 JONES.

positive, the witness is sufficiently corroborated to prevent the application of the general rule. Every circumstance necessary to constitute a complete and binding agreement is distinctly proved: but according to several cases (a) a difficulty in discovering the terms will not prevent the court from carrying into effect a parol contract where there has been a part performance.

*Mr. Hart and Mr. Joseph Martin*, for the defendant, contended, that the transactions proved were no more than a treaty or understanding, and that a treaty or understanding does not amount to a contract. If the plaintiff had really originally been entitled to a contract for the whole, he would not so easily have given up a part. The contract alledged by the bill is for twenty-one years at a rent to be fixed by *Martin*, who fixed it at 457*l.*, and the plaintiff then goes on to prove a second contract for 400*l.* But the authority of 7th October 1809, is in fact a written agreement, which renders it impossible for the court to receive evidence of any contract by parol. There is no proof as to any term of twenty-one years, except the evidence of *Morphett*; and it is to be recollected that he is the plaintiff's father, and it may be inferred from his acts, that he had a community of interest. It is clear that no terms were ever finally settled between the parties. There is no contract even by parol for a lease of these lands at 150*l.* a year. The answer of the defendant positively denies the agreement for a lease for twenty-one years. It is not disputed that if there are circumstances corroborating the witness, his testimony may outweigh the answer, but that doctrine has never been applied to the case of a parol contract. It is clear that the plaintiff entered as a common tenant without any terms whatever. The cases as to parol contracts have gone a great length, almost to the repeal of the statute, and they are not to be extended. The passage quoted from

(a) 5 *Vin. Abr.* 522, pl. 38, 40.

*Clinan v. Cooke* (a) is a mere *dictum*, and not the deliberate judgment of Lord *Redeale*. The principle as to possession being a part performance cannot apply here, for the plaintiff could not be a trespasser, having entered under an express written authority. It is said that there has been a part performance of a second agreement by giving up part of the lands in the original agreement: but there is no case where such an act has been held to be a part performance, and to consider it so would be to carry the doctrine of part performance to an alarming extent. A tenant in possession gives up part of the lands, and that circumstance is to let him into parol evidence to prove a lease for any number of years: and if so, why may he not with equal reason be allowed to prove a contract for the fee-simple?

1818.  
MORPHETT  
v.  
JONES.

*The MASTER of the ROLLS.* If the statute of frauds be a bar to the plaintiff's remedy, on the ground that this was originally a parol agreement, it would be unnecessary to examine the evidence. But it is argued, that there has been a part performance sufficient to prevent the operation of the statute; and that forms a principal question in the cause. In order to constitute a part performance there must be some act unequivocally referrible to the contract. The principle is, that the statute is not to be made the instrument of fraud; that one party permitting the other to act on the faith of the agreement, and to do acts which are the necessary consequence of that agreement, shall not afterwards be permitted to turn round and say that he will treat all those acts as a nullity: but according to all the cases the acts of part performance must be unequivocal. As between landlord and tenant, when the tenant is already in possession, the fact of his continuing in possession amounts to nothing; but where a person not in possession makes an agreement with the owner, and enters into possession, such possession has always

(a) 1 Sch. & Lefr. 41.

1818.  
  
**MORPHETT**  
 v.  
**JONES.**

been held to be a performance, because it is an unequivocal act referrible to the contract. The act of a stranger on the land cannot be explained except by reference to a contract; it has always been considered as evidence of some antecedent contract, and lets in the enquiry what that contract was; the court not considering the act to be a mere trespass or unauthorised possession. In the present case, the fact of taking possession is unequivocally proved; it happens to be proved in writing, and there is no doubt that the plaintiff had an authority rightfully to take possession. The defendant does not dispute that there was some contract, but the question is, what was the nature of that contract? Up to a certain extent both parties agree. It is not disputed that there was a treaty;—there is no question about the quantity of land;—that *Morphett* the elder was agent for his son;—that there was a meeting, and a treaty for the tenancy. It is not disputed by the defendant, that the plaintiff took possession in consequence of a contract for a tenancy from year to year, with an expectation of a lease promised, but not so as to be obligatory, because it did not specify any term; and that in the interim he was to hold at 400*l.* a year. On the other side it is said, and proved by *Morphett* the elder, that the transaction went further:—that it was specified what was to be the duration of the lease;—and that although *Martin* was to ascertain the rent, yet that when he had fixed it, the defendant agreed to reduce it to 400*l.* and that it was settled finally to be a contract for a letting for twenty-one years at 400*l.* a year. If this be a real representation, all the terms of a contract were complete. But it is said to be positively and unequivocally denied by the answer of the defendant: and he certainly is positive that the term was never fixed. It is unfortunate that the subject is now discussed at a period of six years after the parties met: but we must endeavour to see whether *Morphett's* testimony is sufficiently confirmed to preponderate over the positive oath of the defendant, it being quite clear that the testimony of one witness may be sufficient

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if corroborated. And it appears to me that every thing which passes subsequently is clearly confirmatory of his evidence. It would be very difficult for the parties to ascertain the quantum of rent without accompanying it with the duration of the lease. The first question to be asked would be, whether the rent to be fixed was to be that of a mere yearly tenant, or of one who was to hold for a certain period of time. As it is admitted that there was a promise of a lease, it would be premature to have fixed the rent till the duration of the lease was also fixed. It is therefore probable that they understood also the duration of the lease, because the rent was ascertained. Down to the year 1810 nothing more was done to fix the duration of time, yet the rent of 400*l.* appears to have been regularly paid: and it cannot be supposed that they would go on paying the rent if nothing was agreed on; for the quantum of rent would in that case have been as much unsettled as any other of the terms. It is said that the written authority of the 7th *October* 1809, is the agreement between the parties, and that we cannot resort to parol evidence for the purpose of introducing a term not specified in that instrument. But I cannot see the paper in that light. It was a natural consequence of the antecedent agreement, but it was not the agreement itself. It was an authority in consequence of the antecedent agreement, and it agrees in point of time with the parol agreement which has been proved. The next act is the letter written in *March* 1810, about five months after the contract was entered into. Nothing intermediate had taken place to render the tenancy more permanent than before. It is a letter which is not referrible to a case where nothing was fixed except in honour. Is it plain and imperative? It is on the contrary rather the letter of a landlord who had entered into an equitable agreement, addressed to a person who might either give or refuse his assent to the proposal it contains; speaking of a term, and of a lease; clearly shewing that the writer was addressing one who had a right to some permanent interest. It is contended that the plaintiff's giving

1818.  
  
 MORPHETT  
 v.  
 JONES.

1818.  
  
**MORPHETT**  
 v.  
**JONES.**

giving up part of the premises was a gratuitous relinquishment. About seventy acres out of one hundred and fifty were agreed to be delivered up, and the rent was to be reduced. Was that no consideration to the tenant? He had before one hundred and fifty acres at 400*l.* and he retained eighty acres at 150*l.* It might be a fair consideration and inducement for him to part with a portion, that there was an agreement to reduce the rent to 150*l.* The receipts are strong evidence as to the original rent having been 400*l.* for they are not given as for money on account of rent, but for rent generally. When the letter of the 2d *November* 1810, was written, there had been nothing to render the tenancy more permanent. Another application is made by that letter. The plaintiff was desirous of selling the estate, and he not only applies to the plaintiff to relinquish the possession, but agrees to give him two years rent as a consideration for doing so, and to make up for some supposed right which he had. It is said that being a man of honour, he might do that voluntarily on the plaintiff's agreeing to relinquish; but at a subsequent period the same gentleman does not scruple to give the plaintiff a notice to quit:—if he was then willing to give him a notice to quit, why should not he have done the same in 1810? Why should he have been more desirous to observe his honorary obligation at the former than he was at the latter period? In 1810 he had received a direct refusal, which he might then have said was a reason for his giving a notice to quit,—on the contrary he acquiesced in the refusal, and said, that the plaintiff must have his lease. This appears clearly from the evidence of *Morris*. Is not that a strong circumstance to confirm the representations of *Morphett* the elder, that there was a fixed agreement, of which the defendant could not deprive the plaintiff? There is abundant reason for holding that the testimony of the witness is confirmed. When once the first agreement is fixed as a binding agreement, there is only afterwards a reduction of the quantity of land contained

tained in it. There is nothing by which the plaintiff has given up the residue of the land. I am clearly of opinion that the contract ought to be carried into execution.

Specific performance decreed, with costs.

1818.

MORPHETT  
v.  
JONES.

*The PRINCESS of WALES v. The EARL of  
LIVERPOOL and COUNT MUNSTER.*

March 7, 10,  
17.

THE bill, which was filed by her Royal Highness *Cardine Augusta*, Princess of Wales, by *Anthony Buller St. Leger*, Esq. her next friend, stated, that in or about the month of *August* 1814, *William*, late Duke of *Brunswick Oels*, deceased, for the purpose of securing the sum of 15,000*l.* sterling to the separate use of the plaintiff, signed and delivered to her a certain promisory note or instrument in writing, bearing date the 24th *August* 1814, and that he thereby assured to her the re-payment in the year 1816, of the sum of 15,000*l.* sterling with interest in the mean time; and that he also for the same purpose signed and delivered to her another promisory note or instrument in writing, bearing date the same 24th *August* 1814, and that he thereby assured unto her payment in the month of *August* 1816, of the sum of 15,000 *French* louis, at the rate of 24 *French* livres each, together with interest for the same in the mean time. The bill then stated the Duke's death in *June* 1815, and that he made his will and appointed the defendants his executors, who had proved the will, and possessed themselves of his personal estate and effects, more than sufficient to satisfy his debts: that the principal sum secured by the said notes or instruments, together with interest from the 24th *August* 1814,

Where in a bill against executors, the plaintiff stated two instruments executed by the testator for securing the same debt; on an affidavit of one of the executors that he had seen one of the instruments, and stating circumstances appearing on the face of that instrument, creating doubts respecting its authenticity; and that the second instrument had been produced by the plaintiff for payment in a foreign country, and also stating the defendant's belief that before answer he should have an inspection of

the second instrument, that his answer might meet the case: it was ordered that the defendants should not be called on to answer till a fortnight after the second instrument should be produced.

1818.  
 ~~~~~  
 The  
 PRINCESS of  
 WALES  
 v.  
 The EARL of  
 LIVERPOOL.

was wholly due and owing to the plaintiff for her separate use :—and the bill proceeded to interrogate the defendants, “ whether in or about the month of *August* 1814, or when, the said *William* late Duke of *Brunswick Oels*, for the purpose of securing the sum of 15,000*l.* sterling to the separate use of the plaintiff, did not sign and deliver to her two promisory notes of such date respectively, and of such tenor and effect as in the bill in that behalf mentioned, or of any and what other date respectively ? and whether the said principal sum secured by the said notes or instruments, together with interest on the said sum from the 24th day of *August* 1814, was not wholly due and owing to the plaintiff ?”—And the bill prayed that the defendants might either admit assets of the Duke sufficient to pay the said principal sum of 15,000*l.* and interest, or that an account might be taken of his personal estate in the usual manner, and that the same might be applied in a due course of administration ; and that if necessary, an account might be taken of what was due upon the said notes, and that the amount thereof might be paid to the plaintiff for her separate use.

A motion was made on the part of the defendants, “ that the plaintiff might produce and leave with her clerk in court for the usual purposes, a certain promisory note or instrument in writing, in the bill mentioned to bear date the 24th day of *August* 1814, whereby it is in the bill alledged that *William* late Duke of *Brunswick*, deceased, assured to the plaintiff payment in the month of *August* 1816, of the sum of 15,000 *French* louis, at the rate of 24 *French* livres each, together with interest for the same in the mean time :—And that the defendants might have a fortnight’s time to answer the bill after such instrument should have been so produced.”

The motion was supported by an affidavit by Count *Munster*, stating that he was advised and believed that an inspection of the note above referred to, might afford to him and the

the other defendant, the Earl of *Liverpool*, material information as to their defence : and that the note had never been shewn to the deponent, nor, as he was informed and believed, to the Earl of *Liverpool*.

1818.  
 ~~~~~  
 The  
 PRINCESS of  
 WALES  
 v.  
 The EARL of  
 LIVERPOOL.

Mr. *Solicitor-General* and Sir *Arthur Piggott*, in support of the motion. If this were a case depending in a court of law, there could be no difficulty in applying to that court to compel the production and even to grant a copy of the instrument before the defendants could be called on to plead to an action brought upon it. Where the action is on an instrument under seal, the party is obliged to make proof of it, and to bring it into court, and the defendant may prayoyer and take a copy of the instrument ; by analogy to the rules as to instruments under seal, where actions are brought on bills of exchange, or other securities of that nature, the court has been for several years in the habit of making an order on the defendant's application, that a copy shall be delivered to him in order that he may make his defence. It would be singular if a similar order could not be made by a court of equity, for it is not denied that the same end may be obtained by filing a cross bill, and obtained for the same purpose,—that of affording the means of defence in the original suit. If the bill in the original suit admits the instrument to be in the plaintiff's possession, the court may by an order in that suit compel its production, instead of putting the defendant to file a cross bill. In the present case the necessity for the production of the instrument is apparent :—here is one bill for the payment of 15,000*l.* sterling, and another for the payment of 15,000 *French* louis, which is said to be for the same sum. It is possible if this is not brought into court, that it may have been enforced, or may be about to be enforced, in a foreign state against the assets of the testator. Supposing the defendants should have any reason to doubt the authenticity of any part of the transaction,—for instance, the signature of the Duke ; as they are called upon to state whether he signed



1818.  
  
 The  
 PRINCESS OF  
 WALES  
 v.  
 The EARL of  
 LIVERPOOL.

these instruments, and whether the sum is not still due, it is highly necessary that they should see the other instrument for the purpose of enabling them to make that answer; for as executors they are probably ignorant of the transaction. If a defendant be asked whether he himself made a written instrument he may be expected to say whether he did make it or not—but where an executor is called on, by a suitor, alledging herself to be a creditor, stating two written instruments for securing the same sum, one of which only is produced, it is consistent with the principles of justice that he should, before answer, have an opportunity of seeing both. It would be enough to say that by possibility the other instrument may be satisfied or disposed of and produced elsewhere. Suppose the case of a trader who alledges that he has two securities of the same description for one and the same debt; if on an inspection had of one, any suspicion occurs, it cannot be denied that the production of the other might remove or confirm that suspicion: and on what principle should it be necessary for the defendant first to answer and then to have recourse to a cross bill in order to obtain that discovery and inspection which can be useful only before he answers the original bill?

*Sir Samuel Romilly, Mr. Martin, Mr. Bell, and Mr. Shadwell, contrâ.* This is a case of almost daily occurrence, and yet no precedent has been or can be produced, in which such a motion has been granted; and the application is equally unfounded in principle. There is no such analogy as is contended for between the proceedings in this court and in the courts of law: on the contrary, your Lordship has decided, that where a plaintiff had stated in his bill the substance of a deed, and prayed leave to refer to it for greater accuracy, the defendant was not entitled to the production of it. If the discovery is wanted, it should be sought by a cross bill. It is said that without the production of the instrument, the defendants do not know what answer to put in. But their  
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course is extremely easy—they may put in an answer imposing on the plaintiff the necessity of proving every thing—they have only to say that they are the personal representatives of the Duke of *Brunswick*; that they know nothing of the plaintiff's demand, and that they refer her to such proof as she may be able to make. The plaintiff could not require more; it would be an answer which could not be excepted to, and which could not prejudice the defendants. The circumstance of there being two securities for the same sum cannot vary the case, for before any decree can be obtained for payment both the securities must be delivered up. The fact stated in the bill as to the two instruments being for the same sum, would be evidence against the plaintiff; and before the court could compel the executors to pay the debt, which is allowed to be but one, though secured by two instruments, the court would call on the plaintiff to produce, prove, and deliver up both the instruments. With regard to bills of discovery, it is clearly established that a party is entitled to a discovery of those circumstances alone which are necessary for the support of his own case; he has no right to know the case of his opponent, except so far as he chooses to bring it forward in evidence; and a bill of discovery may be demurred to by shewing that the party has not a right to such discovery, because the fact of which he seeks a discovery, is not to support his own case, but to enquire into that of his adversary. There is no doubt that there may be cases where that which *prima facie* appears to be the case of one party, may be material to the case of the other; as if an action be brought on a deed which is the foundation of the plaintiff's title at law, which deed contains recitals material to establish the pedigree of the other party; the production of that deed may be necessary: yet the principle is the same—that a party has not a right to a discovery of that which constitutes the title of his opponent, unless it contains that which is material for his own case. This shews the absolute necessity of adhering to the rules of the court which require that if a party wants a discovery,

1818.  
  
 The  
 PRINCESS of  
 WALES  
 v.  
 The EARL of  
 LIVERPOOL.

1818.

*The*  
**PRINCESS of**  
**WALES**  
*v.*  
**THE EARL of**  
**LIVERPOOL.**

discovery, he must file a bill and state his case, in order that his adversary may have an opportunity of answering it. Suppose the case of a person filing a bill for a discovery, and stating that a certain deed, though it forms a link in the title of the defendant in the bill of discovery in some other suit, yet contains other matters important to the plaintiff's case—and suppose an affidavit to be filed that it did not contain such matter,—would the court, on the production of such an affidavit, order the defendant to produce his title? If so, what would become of all our pleas of purchase for a valuable consideration? Attempts would constantly be made to produce a discovery of deeds in order to get at something else, and not that which is the professed object of the application. These observations are made for the purpose of illustrating the general principle, and of shewing how necessary it is that in a cross bill the party should state what is the use he intends to make of the documents required. The present is the case of a bill in which the plaintiff's title is stated to be founded on certain written instruments. It may be assumed for the present, that an affidavit is filed which states a clear case for the production of the instrument now required;—the court clearly cannot discuss the question. The paper which constitutes the title of the plaintiff in this case, is the property of the plaintiff, and cannot be taken away until the right has been examined and determined in a legal manner; and it can only be examined in a legal way by stating the circumstances which shew the right of the other party to its production. The present application has a tendency entirely to destroy bills of discovery. The court has not the means of deciding on motion whether a party ought to produce a document he has in his possession, nor can the plaintiff by an order on motion be deprived of the possession of the document in question. It is a general rule of the court never to make an order on which a party can be committed except on his own actual confession. There is no confession here. If they file a bill of discovery, a discovery will be made with all the

the circumstances attending it; but if they can succeed in this application, every plaintiff may have the question whether he is entitled to the production of a document, discussed and determined on affidavits. The present question does not depend on the form of the affidavit: but it may be observed, that the affidavit shews no ground for the application, it merely states that Count *Munster* has been advised that from an inspection of the instrument there "may" arise something material to his case.

1818.  
  
 The  
 PRINCESS of  
 WALES  
 v.  
 The EARL of  
 LIVERPOOL.

*The LORD CHANCELLOR* at the close of the argument made the following observations:—This is a bill filed against two persons who are executors, and I understand, in trust for infant children; and the bill is filed by the plaintiff as a creditor on two securities stated in the bill, for the purpose of having payment out of the assets of the deceased debtor. The case certainly is of material importance with regard to the practice of the court. I shall say little upon it at this moment, for I will not now give my final judgment.

It has been the practice of a court of law to have a proferret, and where an instrument is lost, upon which if there had been a proceeding at law before it was lost, the plaintiff must have made a proferret of the instrument, it is within my own recollection that the courts of common law have taken by a special mode of proceeding in pleading, that jurisdiction which formerly belonged to a court of equity where instruments were lost; and that they have done on an understanding that they were doing exactly what a court of equity would do. That is the principle on which they have held, that if a plaintiff brings his action on a promisory note or a bill of exchange, he may be compelled on motion to permit the inspection of that instrument by the defendant. I think I speak from a recollection which does not deceive me, when I say that Lord *Mansfield* first adopted that rule; and having himself long practised in a court of equity, he adopted that rule upon a supposition that he was only putting the plaintiff to do that which a court of equity would call for. Speaking  
 with

1818.

~ ~  
 The  
 PRINCESS of  
 WALES  
 v.  
 The EARL of  
 LIVERPOOL.

with all the deference and respect which must ever be due from the profession to Lord *Mansfield*, it does not appear to me that he did exactly at that moment recollect what a court of equity would do: for there is a mighty difference between simply producing an instrument, and producing an instrument in answer to a bill of discovery, where the defendant has an opportunity of stating together with that production, every thing that would protect him against the possible evil effect of the discovery. I do not apprehend that those circumstances will apply to the present case; but the present case must be considered with reference to what is the practice in this court; and it must be considered not only what is the practice of this court, but if on the other hand we are to admit that there may be particular circumstances forming exceptions to the rules of practice, (as there must be in all cases of practice) we must on the other hand take a great deal of care that we are quite sure that the particular case forming the exception does actually exist; and we must not only take care that it does actually exist, but that when the application is made in the particular instance, it is proved that it exists. It becomes therefore extremely necessary with reference to all our rules relative to compelling the production of instruments, whether they are to be looked at as instruments mentioned in the bill, or instruments mentioned in the answer, to consider what those rules require a plaintiff to admit, and what those rules require as to a defendant admitting the possession of the instrument; and therefore looking at this bill which states a double security for the same sum, and states it in the terms in which it has been represented from the bar, we are to look to see what that bill says about the possession of the instrument; and as no answer has yet come in, to look at the affidavit; always recollecting that in this case as in every case, from whomsoever the affidavit may flow, it must, if the affidavit is itself to be made the foundation of a rule of exception, state the case upon which that exception shall rest. I will look at my own notes of practice before I finally dispose of this case.

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The LORD CHANCELLOR fully stated the bill and the notice of motion, and pronounced judgment to the following effect:—For the purpose of illustrating what I may have to say presently, I observe here that the bill does not represent the notes as being in the possession, custody, or power of the plaintiff; and it would be a consideration to be attended to, regard being had to what the court has settled with respect to motions for the production of instruments by defendants, how far that circumstance would or would not be material. It would necessarily, I presume, be contended on the one hand, that supposing you could move for the production of instruments stated by a plaintiff, instead of getting at that production, by a cross bill, that if a plaintiff does not state that the instruments are in his custody, power, or possession, the plaintiff would not afford the same case for an order for production, which the defendant affords when he states that the instrument is in his possession, custody, or power; and which according to modern doctrine, I take it, he does not state, when in his answer he only refers to an instrument. We know that in a case in Lord Talbot's time (a) where a bill was filed for the purpose of relief, and where the defence was, that a recovery had been suffered that barred the plaintiff's right, and the answer referred to a deed that was executed in order to lead the uses of that recovery, upon a motion made before Lord Talbot, he directed the deed to be produced by the defendant, merely upon the ground that the defendant had referred to it in the answer: and he stated as his principle, that inasmuch as it would be necessary to produce at the hearing, the deed to make the tenant to the *præcipe*, it was fit it should be produced upon motion. The subsequent cases appear to me, however, to call into question the doctrine stated in that case with respect to the production of deeds: for in *Lady Shaftesbury v. Arrowsmith* (b), and *Burton v. Neville* (c), this court held that a party has a right to call

1818.

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The  
PRINCESS of  
WALES  
v.  
The EARL of  
LIVERPOOL.  
March 10.

(a) *Bettison v. Farrington*, 3 P. Wms. 363.

(b) 4 Ves. 66.

(c) Cited 4 Ves. 67.

for

1818.  
  
*The*  
**PRINCESS of**  
**WALES**  
 v.  
*The* **EARL of**  
**LEVERPOOL.**

for the instruments that created that estate tail under which he claims, but entertained great doubt whether he had a right to take out of the hands of the defendant those instruments on which the defendant framed his title and disappointed the plaintiff's expectations of that estate tail, or rather thought that he had not any such right ; and subsequent cases seem to me clearly to have determined that the mere reference to an instrument in an answer, does not make the instrument evidence, though by amending the bill and addressing questions to that point, the plaintiff may compel the defendant to produce it as part of his answer.

On the other hand it will be to be considered, and the question is new, where a plaintiff files a bill and makes a demand on such instruments as these, whether the court would not feel that the instruments upon which the plaintiff comes into court to make his demand, are instruments that the plaintiff can proffer to the court ; and whether if the objection were founded simply upon the want of a statement in the bill that they were actually in the possession, custody, or power of the plaintiff, but the plaintiff makes a demand upon the footing of such instruments, you would not infer that they were in the custody or power of the plaintiff until the contrary was proved ; upon that I give no opinion at present.

The answer called for from these defendants is, an answer which is to apply itself to the interrogatories with respect to these two notes ; and it has been observed that there is a singularity in this case arising from the circumstance, that though the date of the bills is mentioned, the period at which they were actually framed is not mentioned ; that two notes are given apparently of the same date for the payment of the same sum of money, and where it is obviously clear that if the demand can be substantiated against the defendants, they would have a clear right to have both securities delivered up ; they would have a clear right to call upon the court to take care that whilst the plaintiff is calling for the payment of this demand out of the assets of the deceased Duke of *Brunswick,*

with, justice should be done on the other hand to those representing his assets, by taking out of all possible speculation, as the ground of all possible suit, both these documents, if both were given for the same debt ; and under these circumstances the present motion is made ; first, I presume, with a view to the court's knowing that these instruments can be so dealt with, in case there is a hearing ; and in the next place for the purpose of enabling the defendants to put in an answer to the interrogatories, framed in the way in which I have represented them to be framed.

The general doctrine of this court upon this subject, as I have understood it in practice, I have taken to be this, as now settled ; that if a plaintiff files a bill against a defendant, it will depend entirely upon the manner in which the defendant expresses himself with respect to any instrument that the plaintiff may have a right to call for, whether he can call upon the defendant for the production of it upon motion ; if the defendant states in his answer that there was such a deed, though the plaintiff may have an interest to have it produced, it seems to me of late to have been settled that that is not enough : and that the plaintiff must in some way fix the defendant with the possession of that deed ; and that doctrine I have understood to proceed upon this,—that if the court were to make an order that the defendant should produce an instrument, and that instrument was not produced, the court would not find itself able to apply its process for disobedience ; for this reason, that there is no *constat* upon the proceedings that the party could obey ; and therefore the usual course has lately been to amend the bill, and to call upon the defendant to make such an admission in the answer that you can proceed to call for the production, and can enforce that call by the process of the court.

On the other hand it has been taken to be a doctrine of the court, that if a defendant wants to have the production from a plaintiff, where the plaintiff does not in his bill say, what he may do, viz. that he has left the instrument in the hands

1818.  
  
*The*  
 PRINCESS of  
 WALES  
 v.  
 The EARL of  
 LIVERPOOL.



1818.  
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 The  
 PRINCESS of  
 WALES  
 v.  
 The EARL of  
 LIVERPOOL.

hands of his clerk in court, in order that the plaintiff may inspect it, and praying (as our ancient bills used to pray) that after having inspected it he may then give an answer to the interrogatory that is addressed to him upon the subject, whether he admits the instrument or not. The general rule of the court, at least as I have understood it, is this; that the defendant must file a cross bill in order to have a discovery of that instrument. That is the general doctrine of the court. It has been stated that courts of common law would do what, unless I misunderstand their modern practice, they certainly would do for asking for,—that where a person in his declaration founds his demand upon an instrument (this promissory note for instance) the defendant may ask of the court that the plaintiff at law shall permit him to have the inspection of the instrument, to see whose hand-writing it is, whether it has any stamp upon it, and so on: in order to know where it was made, and whether it has all proper requisites. I speak with some diffidence, but I believe that doctrine originated in a court of law upon the idea that there was no reason that a court of law should not do that which a court of equity did. Upon the same reasoning as to actions on lost instruments, I think I may venture to say, that even at the time I entered *Westminster Hall*, the general opinion of the profession was, that it was required by the rules of law that you should come into a court of equity. I state that as the opinion of that great man (for he was such, both as a common lawyer, and as a judge in equity) Lord *Hardwicke*, he not only is stated in many printed reports to have said, but I have frequently seen it in his manuscripts, that no such thing could be done in a court of law. But there have been introduced many doctrines, supposed to be doctrines of courts of equity, which have been introduced without attending to the guards under which courts of equity acted, and which guards the courts of common law could not apply; for instance, as to profert: a man cannot come into this court without guarding his entry into it by sanctions which they cannot allow in a court of  
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common law; and it is whimsical enough, that in some cases, whilst a court of common law has given the defendant at law a remedy, because that defendant at law might have had it in equity, it has just turned the thing round, and obliged the defendant at law to come into equity to protect himself against that practice at law, which was supposed to be founded upon its similarity to and its identity with the practice of equity. So with respect to these promisory notes, there is no doubt that there is a great deal of difference; and one difference is this; that when the courts of common law said that in as much as a court of equity will compel you to allow these promisory notes to be seen, therefore we will compel you to allow them to be seen, they forgot this; that when you call by a cross bill for the production of the promisory note, in the hope and expectation that the production of the note will upon the face of it or otherwise, furnish arguments in favour of the plaintiff in the cross bill; the defendant makes that production with all the explanation which he thinks proper to give with respect to the matter, contents and circumstances, attaching upon what is produced: but the mere production of the instrument would leave him without any one of those safeguards which he can throw round himself in making an answer to the cross bill. On the other hand there is this circumstance to be attended to, that a party can have no answer to a cross bill, till he has himself answered the original bill; and if therefore it is necessary for the purpose of enabling him to make an answer to the original bill that he should have production,—that necessity founded on special circumstances clearly shewn; in that case the rule of the court would operate injustice if there can be no exception from, and no relaxation of that rule: and that this has been contemplated long ago, appears to me to be clear from a passage to be found in the *Practical Register* (a), which is a book of very considerable authority, where in treating upon this sub-

1818.  
  
 The  
 PRINCESS of  
 WALES  
 v.  
 The EARL of  
 LIVERPOOL.

(a) Mr. Wyatt's edit. p. 161.

1818.  
 The  
 PRINCE of  
 WALES  
 v.  
 The EARL of  
 LIVERPOOL.

ject it is said, that where a deed in the plaintiff's hands, mentioned in the plaintiff's bill, is necessary to the defendant's making his defence and a full answer, the court will order that the plaintiff shall give him a copy of it: and it does seem to me that if no authority could be produced for this, the obvious justice of such a position would very well authorize the court to make a precedent upon the subject. There is no general rule I apprehend with respect to the practice of this court that will not yield when the clear and obvious demand of justice requires, as has been decided in *Beckford v. Wildman* (a), in which something more was sought than that the defendant should produce and give inspection and a copy of the instrument, namely, that the instrument itself should be kept in the custody of the court till the hearing; because if it was not secured in order to be produced to the court at the hearing, the justice which arose out of the variations between that deed and other instruments with which it was to be compared, might be defeated. The court there stated one or two authorities; one in which it had ordered it and another in which it had refused it. The court laid down the rule, that to the justice of the case the general rule would yield so as to form an exception. In some of those cases it did go beyond the general rule of the court, and in other cases it refused to go beyond it, because it did not think that the case required its going beyond the general rule.

Now having stated this, I confess it appears to me that the affidavit on which this motion has been made, falls short of establishing that necessity which ought to exist for a departure from the practice. It is quite obvious, without putting cases, that it may be extremely material that these instruments should be compared—that it should be seen whether they have reference to each other as the bill purports—whether they are on proper stamps—whether there are variations that affect the giving validity to either of them; and likewise the necessity must be looked at, that the defendants will have

(a) 16 Ves. 438.

a right to have both of them delivered up at the hearing ; for I cannot agree that the court would be content with an indemnity, and would waive the giving up that bill ; at least I will state that position to be extremely questionable. But this affidavit goes no further in its statement than this ; Count *Munster* makes the affidavit, and from that affidavit the negative inference is, that he must have seen one of the bills. Lord *Liverpool* makes no affidavit, and probably knows less of this matter than Count *Munster* ; but for any thing I know judicially, he may have seen both. Count *Munster* says, that an inspection of the note or instrument of the 24th August 1815, may afford to both the defendants material information as to their defence ; that is, it may afford or it may not afford it ; but how can it be said that this expression points out that necessity which is alluded to in the passage I have quoted ? On repeated consideration of the subject, it appears to me impossible to predicate that it does make out this necessity ; and therefore, if this motion is to be made, it appears to me it can be sustained only by an affidavit, stating more strongly the necessity, and in some measure stating the grounds upon which it is supposed that that necessity exists ; and without making more observation upon it, unless the ground is in some measure stated, it is impossible for the court to be quite sure that they may not be calling for a production which in no case could be compelled or required. Upon these grounds therefore it seems to me that the right mode of disposing of this will be to dismiss the motion, unless the defendants can produce an affidavit that will render them capable of supporting it.

1818.  
  
 The  
 PRINCESS of  
 WALES  
 v.  
 The EARL of  
 LIVERPOOL.

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A further affidavit by Count *Munster* was afterwards filed, stating his information and belief, that in the latter end of the year 1816, the plaintiff sent to one of the executors of the late Duke of *Brunswick* who had not proved the will, two instruments in writing, one in the *German* and the other in the *French* language, both dated the 24th August 1814, and purporting

1818.  
  
 The  
 PRINCESS of  
 WALES  
 P.  
 The EARL of  
 LIVERPOOL.

purporting to be to the same effect, and to be engagements on the part of the Duke to pay to the plaintiff in two years, with interest, 15,000*l.* sterling, therein stated to be lent by the plaintiff to the Duke:—that the two instruments were deposited by the gentleman to whom they were transmitted, in the hands of bankers in *London*:—that on the 7th *February* 1818, Count *Munster* attended at the banking-house, when the instruments were produced to and inspected by him in the presence of several other gentlemen named in the affidavit:—that he had long been in the confidence of the Duke, and in habits of correspondence with him, and was well acquainted with the Duke's manner of writing, both in *German* and *French*; and that he had in his possession many letters of the Duke's in both languages, and that he took with him to the meeting one *German* and one *French* letter of the Duke's for the purpose of comparing them with the two instruments:—that the said written instrument in the *German* language appeared to the deponent upon the comparison of the said *German* letter of the Duke, to be an imperfect resemblance of the hand-writing of the letter, and that neither the spelling nor the construction of the said written instrument were equal to the manner of the Duke, who well understood and wrote the *German* language which was his own vernacular language. The affidavit then specified several expressions in the written instrument which were unmeaning and absurd in the *German* language, and appeared to Count *Munster* to be borrowed from the *English* idiom,—and stated that the Christian name of the Duke in the signature was mis-spelt, and different from his habit of writing—and that the signature was “*Brunswick & D'Oels*” which signature the Duke adopted during the time he was dispossessed of his dominions by the *French*, but not after his return to his dominions in the autumn of 1813. The affidavit further stated that the written instrument in the *French* language appeared upon comparison with the *French* letter of the Duke to be also an imperfect resemblance of the hand-writing of the letter, and that its construction did not appear to

be equal to his manner of writing *French*; and that the signature was also "*Brunswick & D'Oels*," which the Duke was not in the habit of using when the instruments bear date. The affidavit further stated, that the plaintiff had in her bill founded her claim upon the said written instrument in the *French* language, for the repayment of 15,000*l.* sterling, and also upon another instrument in the *French* language, of the same date, for the repayment of 15,000 *louis de France*; and that the deponent was informed and believed, that in *April* 1817, the plaintiff caused the latter instrument to be produced for payment in *Brunswick*, and that the deponent was advised and believed, that previous to putting in his answer to the bill, it was necessary, in order that his answer might fully meet the case, that he should have the inspection of the last-mentioned instrument.

1818.  
The  
PRINCESS of  
WALES  
to  
The EARL of  
LIVERPOOL.

*The LORD CHANCELLOR.*—I have read the affidavit which has been handed to me, and it is enough for me to say, that it lays a sufficient ground for saying that the defendants should not be called on to answer till a fortnight after there has been a production of the instrument. I take that to be the proper practice of the court.

March 17.

GALLAND v. LEONARD.

*FRANCIS MELL* by his will, dated 14th *March* 1810, after giving to his wife *Ann Mell* such part of his household furniture, plate, linen, and china, as she should choose,

Rolls,  
Feb. 14, 17.

A testator gave the residue of his personal estate to trustees, in trust to pay

the interest to his wife for life, and upon her death to pay and divide the trust monies equally between his daughters *H.* and *A.* for their own use and benefit absolutely; and in case of the death of his daughters, or either of them, leaving a child or children living, upon trust, to apply the interest towards their maintenance, and upon their severally attaining the age of twenty-one, to divide the same equally amongst them if more than one, and if only one, the whole to such one child, his will being that the children of his daughters should be entitled to the same share their mother would be entitled to if living: and in case of the death of his daughters without leaving issue living at their deaths, and of all their children dying minors, he directed his trustees to divide his trust monies equally amongst all his nephews and nieces then living:—Held, that the testator's daughters having survived his wife, were absolutely entitled to the trust monies.

1818.  
 GALLAND  
 v.  
 LEONARD.

for her own use and benefit absolutely, and giving her an annuity of 60*l.* during her life, and a legacy of 60*l.*; and giving to his daughter *Ann* a legacy of 1050*l.* to be paid to her on her attaining the age of twenty-one years, with interest; gave the residue of his personal estate to *Robert Galland*, *John Leonard*, and *John Spicer*, upon trust, to convert into money, and after payment thereof of his debts, legacies, and testamentary expences, declared the trusts of the residue in these words:—"Upon trust to place out the residue thereof at interest, upon real or government securities, and continue the same out at interest during the term of the natural life of my said wife *Ann Mell*, except only the said sum of 1050*l.* above given to my said daughter *Ann*, on her attaining the age of twenty-one years; and the interest thereof to be paid to her half yearly; and upon trust to pay to her my said wife the said annuity of 60*l.* a-year for her life, in manner aforesaid; and upon her death, then upon further trust to pay and divide the said trust monies unto and equally between my two daughters *Hannah* and *Ann*, for their own use and benefit absolutely; and in case of the death of them my said daughters, or either of them, leaving a child or children living, then upon further trust to continue the same trust monies out at interest during the minority of such children, and in the mean time to apply a competent part of the interest thereof towards their maintenance and education; and upon their severally attaining their respective ages of twenty-one years, then upon further trust to pay and divide the same unto and equally amongst them, if more than one; and if only one child, then the whole to such only child; my will and mind being, that the child or children of each of my said daughters shall be respectively entitled to the same share his, her, or their mother would be entitled to if then living:—and upon this ultimate trust, that in case of the death of my said two daughters, without leaving issue living at their respective deaths, in the event also happening of all their children dying minors, then my mind and will is, and I do hereby direct my said trustees to  
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pay and divide the said trust monies unto and equally amongst all and every my nephews and nieces then living, share and share alike, for their own use and benefit absolutely."

The testator died on the 10th *May* 1810, leaving his wife and two daughters, *Hannah* and *Ann*, and several nephews and nieces. His widow died on the 3d *November* 1810, leaving the two daughters surviving, one of whom attained the age of twenty-one, and was married, in the life-time of her parents, and had two children; the other attained twenty-one in the year 1813, but was unmarried at the filing of the bill.

The suit was instituted by the trustees named in the will, against the daughters of the testator, the two children of the married daughter, and the nephews and nieces, for the purpose of having the usual accounts taken, and the rights of the parties determined. The cause was heard on the 23d *March* 1813, when the usual accounts were directed, and the cause now came on upon further directions.

The case was argued by *Mr. Parker* for the two daughters of the testator, and by *Mr. Duckworth* for the two children of the testator's daughter *Hannah*, and for the nephews and nieces of the testator.

*The MASTER of the ROLLS.*—The question in this case is, whether the two daughters of the testator are absolutely entitled to the residue of his personal estate. Under the words of the residuary bequest, there are three distinct claims:—first, that of the two daughters, who insist that under the words at the beginning of the clause, they became entitled, on the death of *Ann Mell* their mother, to the whole residue absolutely;—secondly, the claim of the children of the testator's daughter *Hannah*, who insist that they will be entitled, in the event of their being alive at their mother's death, and that she took only a life interest;—and thirdly, the claim

1818.  
GALLAND  
&  
LEONARD.

Feb. 17.



1818.  
  
 GALLAND  
 v.  
 LEONARD.

of the testator's nephews and nieces, who insist that they will be entitled to the ultimate interest, in the event of the death of the two daughters without leaving issue living at their deaths, or of all their children dying minors. There is some difficulty in reconciling the different parts of the will, or if they are contradictory, in determining which part to carry into execution. Literally, the words give the absolute interest to the daughters, yet they are followed by a limitation to their children, [with a provision during their minority; and there is an ultimate trust riding over the whole. If there be a contradiction between different clauses of a will, the rule is, that effect must be given to the last, on a presumption that it expresses the last intention of the testator; but it would be difficult to apply that rule here, for there is in effect but one clause; and to suppose that he altered his mind in the course of it, would be an improbable conjecture. As the court cannot comply literally with the disposition of the testator, it must give effect to it by departing as little as possible from the words he has used. And it appears to me, that the true construction is to give the property absolutely to his two daughters. They were the only children he had, and were the natural objects of his bounty. The gift to them is clear and express: he gives interest as distinguished from capital, to his wife, and upon her death, the trust monies are to be paid and divided equally between his two daughters, meaning that this fund should, on the decease of the tenant for life, be divided equally between them *absolutely*, that is, as contrasted with the interest which he had previously given to his wife for life. He uses the words "for their own use and benefit absolutely," which are adopted in other parts of the will, and there mean the absolute interest; as in the bequest of the china to his wife, which he intended to be her absolute property; and in the latter clause, the trust for his nephews and nieces is "for their own use and benefit absolutely." In all these parts the same terms are used, and in the two latter it is clear that he meant to give absolute interests. I must suppose

pose

1818.

GALLAND  
v.  
LEONARD.

pose that he was familiar with and knew the import of the terms, and that he meant to give absolute interests. But the difficulty is to reconcile this with the subsequent gift to the children of his daughters. It appears to me, however, that he contemplated two events:—First, that the daughters might survive the tenant for life, in which case they were to have the property absolutely; and secondly, the event of their dying in her life-time; in which case he intended to give their shares to their children, and if there should be no children, or they should all die under twenty-one, then to his nephews and nieces. If we consider him as having meant to qualify the gift over in this manner, this construction will reconcile it, and make an entire disposition. It is introduced with words importing contingency; and there are several cases, in which, where such words have been applied to an event which was certain, they have been understood as applying to the happening of the event under particular circumstances, as in the life-time of the testator, or of a tenant for life. By only introducing those words in the present case, effect will be given to the whole will. The cases of *Hinckley v. Simmons* (a), *Lowfield v. Stoneham* (b), and *Cambridge v. Rous* (c), are cases in which a similar construction has been adopted. It is observable also, that the testator, in that part of the clause in which he mentions the children of his daughters, changes the term, and speaks of “interest,” which he directs to be applied for their maintenance, having never used that term in the gift to his daughters. The words, “if then living,” tend to the same conclusion. The children were to take the same shares which their mother would be entitled to if then living; and that the children were to have the capital absolutely is clear. On any other construction the words would be unmeaning, for the children would not have an identity of interest; but in construing the words to apply to the case of death in the testator’s life, or in that of his widow, it gives

(a) 4 Ves. 160.  
(b) 2 Str. 1261.

(c) 8 Ves. 12.

the

1818.  
  
 GALLAND  
 v.  
 LEONARD.

the same share which the mother would be entitled to. The second clause only takes up the second branch of the contingency—the first applies to the case of the daughters leaving children, and the second to the case of the daughters not leaving children. The same construction is applicable both to the first and to the second. The intention, as apparent on the whole will, is, that after the death of the tenant for life, the daughters are to take absolutely. This construction appears to do the least violence to the phrases of the will.

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ROLLS,  
 March 2.

HILL v. SMITH.

A testator having a second wife, and having a son by her, and a son by a former marriage, gave to *W.* his son by his first marriage 3000*l.* stock, and directed the interest to be appropriated to his maintenance, and appointed *S.* and *P.* to be trustees to him till he should attain the age of twenty-four: and gave the interest of the residue of his personal estate to his wife during

*WILLIAM HILL* by his will, dated 5th *August* 1811, “as for and concerning all his worldly affairs and effects, disposed thereof as follows:”—He gave to his son *William Hill* 3000*l.* stock in three per cent. consols and reduced, and directed what might be short of that amount in those funds at his decease to be made up out of his other effects within one year after, and the interest to be appropriated to his maintenance and support under the direction of his trustees therein named; and appointed *Thomas Smith* and *James Powell* to be trustees unto his son *William*, until he attained the age of twenty-four years;—and after giving to his son *William* his gold watch and a book-case, to his wife *Betsy Hill* 300*l.* and some furniture, and to his sister *Ann Pashley* 50*l.*, bequeathed the residue of his property, in the following words:—And I further will and direct that my lease, stock, and utensils in trade, with my other property

her widowhood, and after her death or marriage, “unto any child or children I may have by my wife *B.* to be equally divided between them that attain the age of twenty-one years: the survivor of my children to possess what is here bequeathed to the other: but should not either of my children attain the age of twenty-one years, or live to possess what is here bequeathed to them, then I bequeath to the children of my sister the 3000*l.* stock left to my son *W.*.”—The son by the second marriage died in the life-time of the testator, who left no issue by the second marriage: held that *W.* the son by the first marriage was entitled both to the legacy and the residue.

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and effects not herein disposed of, shall be sold either by public or private contract, as my executors may think best, as soon as possible, but not exceeding one year after my decease, and the monies arising therefrom to be immediately vested in the funds; and the interest thereon, I give and bequeath unto my wife *Betsey* for and during her natural life, provided she remains a widow; and after her decease or marrying I give and bequeath the said stock and interest arising from the residue and remainder of my estates and effects unto any child or children I may have by my wife *Betsey* for to be equally divided between them that attain the age of twenty-one years; *the survivor of my children to possess what is here bequeathed to the other*; but should not either of my children attain the age of twenty-one years, or live to possess what is here bequeathed to them, I further will and bequeath unto the children of my sister *Ann Pashley*, widow, by her late husband *Robert Pashley*, the 3000*l.* stock in the three per cent. consols and reduced, left to my son *William*, on their attaining the age of twenty-one years, equally divided between the survivors of them, share and share alike, the interest on which my said sister *Ann Pashley* may receive during the term of her natural life, if she remain a widow and require it, without being liable to be called to account as to the disposal of the same." And he appointed his wife *Betsey Hill* executrix, and *Thomas Smith* and *James Williamson* executors.

1813.  
HILL  
v.  
SMITH.

At the date of his will the testator had two children;—the plaintiff, who was his only son by a former marriage, and *Edward Hill*, his only child by his then present wife. *Edward* died an infant in the testator's life-time.

The testator died in 1813, leaving his wife *Betsey Hill* surviving, but without leaving any issue by her, and leaving the plaintiff *William Hill* his only child.—*Betsey Hill* died in September 1815. *William Hill*, the son, attained the age of twenty-four on the 15th July, 1815, and on the 7th November in that year, filed the present bill against the surviving executors of the testator, the representatives of his widow,

1818.  
  
 HILL  
 v.  
 SMITH.

widow, and against *Ann Pashley*, and her children, praying a transfer to the plaintiff of the 3000*l.* three per cent. reduced annuities, and that the plaintiff might be declared to have become, on *Betsey Hill's* death, entitled to the residue of the testator's personal estate not specifically bequeathed; and praying an account accordingly.

Mr. *Bell* and Mr. *Garratt* for the plaintiff, contended, that he was entitled to the legacy of 3000*l.* stock, and also to the residue of the testator's personal estate. At the time of the execution of his will the testator had a son by his first marriage;—he had a second wife, by whom he had one child then living. It was his object to make a fair provision for both. His attention was directed, first, to his son by his former marriage, and he also considered the possibility of his having other issue by his second. After giving several legacies, he directs his property to be sold, and the residue to be divided among his children by his second wife. It then occurs to his recollection that his eldest son may die, and that he may have no children by his second wife; in consequence he provides that each family shall be entitled to the provision originally intended for the other; and he further directs, that in the event of the death of all his children, the legacy of his eldest son should go to his sister and her children. This was a wise and sensible disposition of his property, and the words of the will are sufficient to support it. The testator begins with the words, “as for and concerning all my worldly affairs and effects, I dispose thereof as follows,”—indicating an intention not to die intestate with respect to any part of his property. The legacy of 3000*l.* stock to the plaintiff is a complete gift, and there are no words to restrain or cut it down. The distinction which prevails in the Ecclesiastical Courts respecting the time being annexed not to the substance of the bequest, but to the payment, would apply to the present case; for here is a perfect gift without mentioning any time, the subsequent direction only postpones the payment: under  
 this

1818.

HILL

v.  
SMITH.

this clause, had the plaintiff died before he attained twenty-four, his executors would have been entitled to the legacy. The meaning of the subsequent clause is, that he is not to have the principal till he attains the age of twenty-four. After giving several legacies, the testator proceeds to give the residue, after his wife's death or marriage, to his children by her, who should attain the age of twenty-one years, and directs that the survivor of his children should possess what is bequeathed to the other. If he had meant that there should be benefit of survivorship only amongst his children by his second wife, those words were superfluous, for he had before given it to such only as should attain the age of twenty-one. But all doubt is removed by the words which follow;—"but should not either of my children attain the age of twenty-one years, or live to possess what is here bequeathed to them:" in this passage the testator must be considered to have meant the same children whom he had mentioned before, and consequently to have included the plaintiff, and in the words, "or live to possess what is here bequeathed to them," he evidently alludes to the circumstance of the plaintiff's legacy of 3000*l.* stock not being payable till he should attain the age of twenty-four. The court cannot restrain the effect of the words, "my children," so as to make it signify less than all his children. If he meant children by his second wife only, it would be absurd, for the effect would be this—that if his children by his second wife should not live to attain twenty-one, he would disinherit his son by his first wife. That would be a forced, unnatural, and absurd meaning. Upon the whole, it was submitted, first, that it was impossible that the testator could mean the provision for his son by his first wife to go over when the children by his second wife should die;—and secondly, that the word "children" signified all his children.

*Mr. Cooke* and *Mr. Pemberton*, for the defendant *Mrs. Paskley* and her children, and for the representatives of the  
testator's

1818.

HILL

v.  
SMITH.

testator's widow, contended, 1st, that the legacy of 3000*l.* stock in the events which had happened, had gone over to the children of the testator's sister; and 2dly, that the bequest of the residue was become lapsed, and that the representatives of the widow were entitled to one-third of it as undisposed of. The legacy of 3000*l.* was vested in the plaintiff, subject to be divested in favour of his sister and her children, in the event of there being no child of the second marriage who should attain twenty-one: the testator being aware that on that event the plaintiff would, as next of kin, be entitled to two-thirds of the residue undisposed of, which was an adequate provision for him. The residue was given to the children only of the second marriage, and the consequence is, that by the failure of such children it has become undisposed of, and must go either to the executors, or to those entitled under the statute of distributions. A claim is set up by the executors, but it is clear that they cannot be entitled, for whenever a testator has shewn an intention to dispose of the whole of his property, and by any event a part becomes lapsed, the executors cannot take in the character of executors, though they have no legacy: and it cannot be doubted that this testator had such an intention. The law on this subject is clearly established by *Bennet v. Batchelor* (a), *Ugghart v. King* (b), and several other authorities.

Mr. *Hart* and Mr. *Roupell*, for the executors. The testator has only shewn an intention to bequeath the residue on an event which has not happened; it is therefore entirely undisposed of. The case differs from all the other cases where there has been a blank left for the name of the residuary legatee, or where an intention has been shewn to give the residue to somebody: here he has only shewn that intention on an event which never happened. The consequence is, that as no person is able to shew that he was intended by the tes-

(a) 1 Ves. jun. 63.

(b) 7 Cr. 225.

tator to take the residue, it goes to the executors for their own benefit.

1818.

*Hill*

*vs.*  
*Barne.*

*The MASTER of the Rolls.* This is an inaccurate will, but there is sufficient upon it to enable us to discover the intention of the testator. Having issue by his first wife one son, and having also a child by his second wife, it is natural to suppose that he should be making provisions for those two branches of his family before he should provide for his sister. The construction contended for on the part of the sister and her family is, that there was a contingency on which the provision in favour of the only son was to be defeated, viz, the event of there being no children of the second marriage who should attain the age of twenty-one. Why the testator should make the provision to be defeated on such event, it is not easy to suppose. It is said that he contemplated the son's becoming entitled to an interest in the undisposed residue, but it would be difficult to shew that he had such a circumstance in his contemplation, in the absence of any expression to that effect in the will. Looking at the words of the will, his intention appears to have been, to make a provision for his own children, and afterwards eventually to give it over to collaterals. The words are large enough to include all his children. He speaks of the survivor of his children. There is a survivor of his children, for there was another child who died under twenty-one. He appears to have considered his children by his second wife as forming a distinct class; and afterwards taking up the whole of his disposition, and looking back to what he had given to them as a class, to have meant that on the extinction or failure of that class, his surviving child should take the whole. But any ambiguity which might have existed is cleared by the words which follow,—“should not either of my children attain the age of twenty-one years, or live to possess what is bequeathed to them.” On this branch of the will it is impossible to say he did not mean to include both. It cannot be supposed that he intended



1818.

HILL

v.  
SMITH.

tended only the children by the second marriage, for the express sum given to the plaintiff is mentioned. Having given the residue to such children only of the second marriage as should attain twenty-one, the first part of the clause would sufficiently have applied to them, but the latter clause must have been intended to include *William*. This evidently appears by his making a disposition of the 3000*l*. It shews that the words "my children" were meant to include *William*, and that he must also have been included in the word "survivor." This makes sense of all the will; the words are large enough to comprehend it, and it is the natural construction. I think therefore, that the plaintiff having attained the age of twenty-four, is entitled both to the legacy and to the residue.

ROBTS,  
March 4, 9.

## GOLDSMID v. GOLDSMID.

A. by articles previous to marriage, covenanted that if he should die in the life-time of his wife, his executors should within three months after his decease, pay to her 3000*l*. A. died in his wife's life-time, and by his will gave all his personal estate to his four executors, and directed them at the end of three years after his death to divide his property in such ways, shares, and proportions as to them should appear right. All the executors either died or renounced, and no division was made by them. Held, 1st, that the property was divisible according to the statute of distributions, as in a case of absolute intestacy; and 2dly, that the widow's distributive share being more than 3000*l*. was a performance of the covenant in the marriage articles.

*ABRAHAM GOLDSMID* the younger, by articles of agreement, dated 28th March 1791, entered into previous to his marriage with *Martha* his wife, covenanted with trustees, that in case he should die in her life-time, then his executors or administrators should within three calendar months next after such decease, pay unto the said *Martha Goldsmid*, her executors, administrators, or assigns, the sum of 3000*l*.

The marriage took effect, and *Abraham Goldsmid* died on the 9th July 1812, leaving his wife surviving, and having made his will, dated 23d July 1800, in the following terms:—"I desire all my debts to be paid, and as to my worldly estate of all kinds, I dispose thereof as follows:—Having the highest

opinion

opinion of the honour and discretion of my executors herein-after named, and satisfied that they will to the utmost exert themselves for the benefit of my family, I nominate and appoint my good relations and friends (that is to say) my father *George Goldsmid*, *Daniel Eliason*, *Benjamin Goldsmid*, and *Abraham Goldsmid*, joint executors of this my will, and guardians of my minor children. And I give to my said executors all my estate and effects of what nature, kind, or quality soever : to hold to them and the survivors of them, in trust, and to and for the several ends, intents, and purposes following, that is to say ; as it is my wish not to withdraw my capital for three years after my decease, I desire my executors will not do so ; but during that space, take out and apply only so much as they shall deem necessary to defray the expences of my funeral, pay my debts, and give to charities, which I hereby authorize them to do to any extent they may think right, and also what may be deemed by them necessary for the support of my wife and family ; and from and immediately after the expiration of three years, upon trust to divide my property of all kinds, in such ways, shares, and proportions as to them shall appear right : and I declare my mind and will to be, that if any of my family shall dispute such division, and bring any action or suit against my executors and trustees or any of them ; then and in such case, my mind and will is, that such parties shall forfeit and lose all right and title to any part of my estate and effects, and shall be for ever excluded therefrom : and I declare my mind to be, that my executors and trustees may leave any matter in dispute concerning my estate and effects, if any shall be, to arbitration in the common and usual way."

*Benjamin* and *Abraham Goldsmid*, two of the executors, died in the testator's life-time; *George Goldsmid* alone proved the will, but never acted in the discretionary trusts of the will. He afterwards died, whereupon, *Daniel Eliason*, the only surviving executor, having renounced, administration with the will annexed was granted to the defendant *Martha Goldsmid*,  
the

1818.  
GOLDSMID  
v.  
GOLDSMID.

1818.  
  
 GOLDSMID  
 v.  
 GOLDSMID.

the testator's widow, and the plaintiff *John Goldsmid* one of his sons.

The bill was filed by the children of the testator against his widow ; praying a declaration, that under the circumstances his personal estate ought now to be distributed in a course of administration as the same would have been in case the testator had died intestate ; and a declaration that the defendant *Martha Goldsmid* is not entitled to the 3000*l.* by virtue of the marriage articles, as a debt out of the testator's personal estate and also to a distributive share of his personal estate in case it should amount to more than the said sum of 3000*l.*

*Mr. Bell* and *Mr. Perkins* for the plaintiffs. The first question is, whether in the events which have happened, *Abraham Goldsmid* is not to be considered as having died intestate ; and secondly, whether the distributive share of his widow is not in that event to be a satisfaction of the 3000*l.* secured by the marriage articles. It is clear that this was an intestacy. The executors were the persons by whom the property was to be divided : two of them died in his life-time, — one alone proved the will, and is since dead, and the other renounced. It is impossible to give effect to the will ; and there being no persons to make the distribution, it must be now made according to the provisions of the statute (a). Supposing then it to be established that this was an intestacy, the case clearly falls within the principle of *Blandy v. Widmore* (b), *Lee v. D'Aranda* (c), and *Garthshore v. Chalie* (d); in the latter of which cases all the former authorities were much discussed and considered. The principle is, that if a sum equal to the stipulated provision, comes to the party in consequence of the death of the covenantor under such circumstances that his property is divided according to the

(a) 22 & 23 Car. 2. c. 10.

(b) 2 Vern. 709. 1 P. Wms: 324.

(c) 1 Ves. 1. 3 Atk. 419.

(d) 10 Ves. 1.

statute of distributions, it is a performance; and although the words of the instrument are that his representatives shall pay the money, the effect is the same. The only thing meant was, that such a sum should come to her on his death, and he has in effect performed the covenant. The consequence would be the same if there had been a bequest of his property which had failed by the death of the legatee in his lifetime. The fact that there was a will cannot make any difference. An intention may, however, be collected in this case from the will itself, that whatever the wife might take, should be a satisfaction. He directs his executors to divide his property in such ways, shares, and proportions, as they should think proper, and that if any of his family should dispute such division, and bring any action against his executors, such parties should forfeit all right and title to any part of his estate. If the executors had under the power, given 5000*l.* to the defendant, and she had afterwards claimed the 3000*l.* under the covenant, it would clearly have been contrary to the meaning of the testator, and she could not have insisted on both, nor have brought any action on the covenant. It would be extraordinary, that when by the death and refusal of the executors, there is eventually an intestacy, she should be in a better situation than if she had taken under the will.

Mr. *Hart* for the defendant, contended that the cases which had been cited, being cases of absolute intestacy, did not affect the present. This case more nearly resembles *Haynes v. Mico* (a), where a legacy of 500*l.* by the husband to the wife was held by Lord *Thurlow* not to be a satisfaction of a bond made before marriage, conditioned to leave her 300*l.* in the event of her surviving him. If the husband in that case had died intestate it would have been a performance; but the court cannot treat this as a case of intestacy, but must execute

1818.  
GOLDENSB.  
GOLDENSB.

(a) 1 Bro. C. C. 159.

1818.

GOLDENID  
v.  
GOLDENID.

the will which the death of the executors has prevented from being performed. The testator speaks of his debts, and he could not be ignorant that the marriage articles constituted a debt. It is improbable that he should consider any prospective benefit to which his widow might be entitled under a distribution to be made at the discretion of his executors, as a satisfaction. Before they have any discretion to exercise, they must pay all his debts, including this 3000*l*. It was not till the expiration of three years that they could withdraw his capital, or that their judgment was to operate in its distribution. There is a wide distinction between this case and those in which the party has left his estate distributable immediately. There is nothing here which he could immediately take; there is no inference arising from any thing in the will, that she should not have this 3000*l*. It was his one of his debts, and meant his estate to be cleared from his debts. The testator has left her to her strict legal rights, and it is only after clearing the estate of all the debts that the executors could have any power. If he had directed his debts to be paid, and then that the executors should divide his property among his wife and children, it could not be said that because she had taken the 3000*l*. she should not have her distributive share, and that brings the present case within the authority of *Haynes v. Mico*. It is said that this is a *quasi* intestacy; it is, however, no intestacy, for the property vests entirely in the executors; but the power given to them being joint, and not being now capable of being exercised, the court is under the necessity of taking upon itself the distribution; and when that duty devolves on the court, it always, on account of the uncertainty, resorts to the statute of distributions; as the easiest solution of the difficulty, as in *Green v. Howard* (a). The court would therefore be bound first to pay all the debts of the testator; to suffer the residue of his property to remain in his trade during the period of three years, for this was im-

(a) 1 Bro. C. C. 31.

perative on the executors, and is equally so on the court, and at the end of that term to make the distribution. The power is gone by the accident of death, and the circumstance of one party being a creditor cannot make any difference in the case:

1818.  
GOLDSMID  
v.  
GOLDSMID.

*Mr. Bell* in reply. It is conceded that if this were a case of intestacy it could not be distinguished from the authorities cited for the plaintiffs. The argument that what remains after payment of debts cannot be in satisfaction of debts, was equally urged and without success in *Blandy v. Widmore* (a). If the rule depends on the circumstance that an equal sum of money comes to the party in consequence of the death of the covenantor, the fact that there is a will cannot make any difference, for there was a will in *Garthshore v. Chalie* (b). The manner in which the interest arises is not material. In *Haynes v. Mico* (c), Lord *Thurlow* considered it in the light of a mere common debt to a stranger, and that nothing could be a satisfaction of it but a payment or something tantamount to a payment, and compared it to a legacy of 500*l.* to a stranger, payable six months after the testator's decease, which could not be a satisfaction of a bond for the like sum payable in one month after the same event. If this be an intestacy, the argument from that case fails, for Lord *Thurlow's* opinion was founded on the circumstance of the will's deferring the payment of the legacy beyond the time at which the bond was payable. Here the testator was anxious that his capital should not be withdrawn for three years, but he directs that during that space it might be drawn out for the purpose of paying his debts. The question whether this should be a satisfaction or not, could not depend on the executors. When the executors have not acted, the court is obliged to deal with it as a case of intestacy: the clause relative to his family disputing his will in commencing any action, is to the same effect as if he had recited the covenant, and said,

(a) 2 *Vern.* 709. 1 *P. Wms.* 324. (b) 10 *Ves.* 1. (c) 1 *Bro. C. C.* 129.  
VOL. I. L that

1818.  
  
 GOLDSMID  
 v.  
 GOLDSMID.

that if his wife demanded the 3000*l.* and brought an action against the executors, she should be excluded from all share of his property. Upon the whole, if this be an intestacy or tantamount to an intestacy, it is within the rule established by the cases cited for the plaintiffs; and besides, there is an express direction for the benefit of the wife and family, and a provision against their commencing actions or suits, which must mean actions or suits for something *dehors* the will; the effect being the same as if he had expressly mentioned the portion secured by the articles.

March 9.

*The MASTER of the ROLLS.* This is a bill by the six children of *Abraham Goldsmid* the younger, and the only defendant is *Martha Goldsmid* his widow, who is co-administratrix of his effects with his eldest son. The object of the suit is to obtain a decree that the personal estate of *Abraham Goldsmid* is to be administered as in a case of intestacy, and that the defendant ought to be excluded from any right to receive the 3000*l.* secured by her marriage articles, if she takes her share of her husband's personal estate under the statute of distributions. The facts of the case are not disputed; and the single question is, whether on comparing the marriage articles with the will, the widow is entitled both to the provision made for her by the articles, and to her distributive share of the personal estate; or whether the latter is to be considered either as a performance or a satisfaction of the covenant contained in the marriage articles. It is admitted that in the events which have happened, the statute of distributions is to be resorted to as the rule and guide for the division of the property, because the discretionary distribution which was intended to have been made by the trustees, became, under the circumstances, incapable of being exercised, and there are no trusts which can now be carried into execution. The first part of the bill therefore is of course—that a distribution not having taken place, and being now incapable of taking place, the property must be disposed

disposed of by the only rule which can be applied to it,—the statute of distributions. The only additional fact necessary to be stated is, that the amount of the defendant's distributive share will exceed 3000*l.* And the question is, whether she is entitled to take 3000*l.* as a debt, and then to take as her distributive share, one-third of the assets, leaving the rest to the children; or whether her distributive share is to be considered either as a performance or as a satisfaction of the covenant contained in the marriage articles. In considering the subject, the court is not at liberty to examine it as if it were entirely an open question. If it were so, there might be doubts, whether, considering the claim of the 3000*l.* on the one hand, and what she receives under the statute on the other, the latter could be a performance. The one is in its nature perfectly distinct from the other—the one is derived under a contract—it is a specialty debt preferable to legacies, and even to simple-contract debts;—the other is a residue after payment of debts,—derived, not from the husband, but from the law, as Lord *Hardwicke* observed, making a will for one who has made none himself. But it is not necessary, nor indeed is the court at liberty to consider that point; for when more than a century has elapsed since the question has been at rest, it cannot now be considered as open to discussion. The rule is clearly this: a distributive share received by a widow in a case of absolute intestacy, is considered a performance of a covenant from the husband, that she should on his death receive a sum of money, when her distributive share is equal to that sum. I state this as being settled, because I consider it to have been completely established ever since the case of *Blandy v. Widmore* (a), which was originally decided by Sir *John Trevor*, and was affirmed by Lord *Comper*, on appeal, and afterwards reheard by his lordship, and the decree again affirmed. This was in the year 1715; and though more than a century has since elapsed,

1818.  
GOLDSMID  
v.  
GOLDSMID.

(a) 2 Vern. 709. 1 P. Wms. 324.



1818.

GOLDSMID  
v.  
GOLDSMID.

during which time the subject has been frequently under the review of great judges, Lord *Hardwicke*, Lord *Thurlow*, Lord *Alvanley*, and the present Lord Chancellor, that case is to be considered as unshaken. The rule was recognized, and a similar decision made in *Lee v. D'Aranda* (a); and it was again considered in *Barret v. Beckford* (b), as being the clear law of the court; and although it was decided by Lord *Thurlow*, in *Haynes v. Mico* (c), and by Lord *Kenyon*, in *Devese v. Pontet* (d), that in a case of testacy, what was given should not operate as a satisfaction under the particular circumstances, they did not attempt to shake the general principle; on the contrary, they distinguished those cases from the others, but recognizing their authority. The only question then is, whether there is any solid distinction in the present case, where the widow takes a distributive share, not under an absolute, but under a *quasi* intestacy:—where the object being disappointed, an intestacy virtually takes place, and the statute is to be the sole guide to direct the distribution. The principle of the authorities is explained in the elaborate judgment of the Lord Chancellor in *Garthshore v. Chalie*, and after a minute examination of the subject, admitting that it would originally have been difficult to answer the argument of Serjeant *Hooper*, in *Blandy v. Widmore*, he puts it upon this footing: that the instrument is to be construed with reference to the circumstance that there is a claim upon the property independent of the covenant;—and he considers the cases as being distinct authorities that where a husband covenants to leave or to pay at his death a sum of money to a person who independent of that engagement, by the relation between them, and the provision of the law attaching upon it, will take a provision, the covenant is to be construed with reference to that. Now supposing the in-

(a) 1 Ves. 1. 3 Atk. 419.

(b) 1 Ves. 519.

(c) 1 Bro. C. C. 129.

(d) In a note to Finch's edition of *Pre. Cha.* 240, reported also 1 Cox, 188.

strument

strument to be made with that reference, and contemplating what the wife would be entitled to receive ;—the single question is, in a case of intestacy, does she obtain that which she contracts for ? By being clothed with the character of widow, she gets a sum equal to that which her husband covenanted she should receive, and the court is bound to consider that she obtains that for which she contracted. The case is different from an ordinary contract. There was no breach, nor any debt in the life-time of the husband. The distinction between performance and satisfaction is important ;—where there is a question of satisfaction, there must be a reference to the intention. Satisfaction is a substitution of one thing for another ; and the question in cases of that kind is whether the substituted thing was given for the thing proposed. But when there is a question whether there has been a performance with reference to the thing contracted for, the questions are,—whether that which was contracted to be given, has been actually given ; what has been contracted to be given ?—a certain sum ;—and in what event ?—in the event of the husband's death. When the sum is actually given without reference to the marriage contract, it is a performance. The cases of *Haynes v. Mico*, and *Devese v. Pontet*, range under a different class. The former appears to have proceeded on the question as to what was to be done in a case of testacy. It is somewhat extraordinary that Lord *Thurlow* should first have delivered an opinion recognizing the doctrine, and applying it to a case of testacy, calling it a covenant, and not a debt ; yet the reporter states him to have suspended his judgment till a future day, and we have not a very correct account of what passed afterwards ; for without answering his own judgment, he appears to have taken up the case on the doctrine of satisfaction, putting it on the footing of an ordinary debt. The question would seem to have been rather, whether by what the testator left out of his assets, he had not performed his covenant. With regard to *Devese v. Pontet*, it may be sufficient to say with the Lord Chancellor, that

1818.  
  
*GOLDENIE*  
 v.  
*GOLDENIE*.

1818.  
  
 GOLDSMID  
 v.  
 GOLDSMID.

that the covenant was entire, and not of a nature to be satisfied by the provision made by the will. When the subject came before the Lord Chancellor, in *Garthshore v. Chalie*, it was very minutely examined, and sifted to the bottom: and it is now considered to stand on the principle before stated, that construing the covenant with reference to its nature, and to that which alone gives the wife a right at all, viz.—the contract of marriage, the question must be always, is the covenant performed? Taking this to be the law of the court, let us apply it to the present case. Does not the wife take the same interest, and from the same source? She takes a distributive share as in the cases referred to; precisely the same portion in the character of widow she would be entitled to under her marriage-contract. She takes it by operation of law, and not under the testator's intention, for although it was intended to have been divided according to the arbitrary discretion of the executors, yet that being disappointed and totally out of the question, the rule of distribution is the same as if there had been an absolute intestacy; she takes not by any intention of the testator, for he had intended a very different mode of distribution. It is not necessary to consider what would have happened in the case of any bargain between the executors and the widow; nor what might have been done in such a case, and the subject cannot derive any assistance from the intention. The widow receives it not through the medium of the will alone, but of the statute;—that is the measure and source of it;—it is exactly the same as if there had been an absolute intestacy. How then can there be a distinction that the distributive share if taken under a *quasi* intestacy, should not operate as a performance, and yet that if taken under an absolute intestacy it should so operate? Does she not receive it absolutely, and *pleno jure*? There is precisely the same question in the one case as in the other. Every rule and principle in all the cases, and in the last review of them, equally applies to the present case, viz. that the widow is deriving as widow, and under her marriage-contract,

contract, more than she would receive under the covenant. To adopt any other rule would be to decide on those nice distinctions which have been justly reprobated. In substance the widow gets all she had contracted to have in this case as in the others. I am therefore bound to say, that she takes her distributive share, but not in addition to the sum which was to be paid to her under the covenant. It is not my intention to impeach the decisions in *Haynes v. Mico* and *Dexse v. Pontet*; but it is not necessary to consider those cases, as in my opinion they do not affect the present.

1818.  
GOLDSMID  
v.  
GOLDSMID.

MOHUN v. MOHUN.

ROLLS,  
March 7.

**J**OHAN MOHUN made his will in the following words:—

“I *John Mohun*, of the township of *Cornforth*, do make this my last will and testament. I leave and bequeath to all my grand-children, and share and share alike, as witness my and seal, this 14th day of *April* 1814.” The will was attested by three witnesses. On the same paper were written the following words, without date, but proved to have been executed on the same day as the will;—“And further, I appoint *Thomas Haswell* and *Thomas Eggleston* my trustees for all my grand-children and nieces, as witness my hand.” This codicil was attested by three witnesses.

These words in a will, “I give to all my grand-children, and share and share alike,”—“and I appoint *A. B.* and *C. D.* trustees for my grand-children and nieces,” pass no interest in the real estate.

The testator was at the execution of his will, and at his death, entitled to real and personal estates; and administration, with the will annexed, was granted to the mother of one of his grand-children during his minority.

The testator left nine grand-children; and the bill was filed by five of them against the remaining four (one of whom was

1818.  
  
 MORUN  
 v.  
 MORUN.

was the testator's heir at law), the trustees, *Eggleston* and *Haswell*, and the nieces of the testator; charging that the effect of the will and codicil was to devise and bequeath all the testator's real and personal estate to or in trust for the plaintiffs, and his other grand-children, in equal shares, and that the plaintiffs were therefore entitled each to one-ninth part of the real and residuary personal estate of the testator, and praying that the will and codicil might be established, and the trusts carried into execution; that the rights of the plaintiffs to the testator's real estates might be ascertained; an account of the rents and profits, and a receiver.

*Mr. Bell* and *Mr. Mascall* for the plaintiffs, *Mr. Roupell* and *Mr. Charles Harrison* for defendants in the same interest, contended, that the testator's intention was by this will to pass the whole of his real and personal estates. By appointing trustees he must be taken to have intended to give them some property over which a trust was to be exercised, otherwise the words are entirely rejected; and being appointed trustees to his grand-children and nieces, the beneficial interest vests in them. If he had said he left all to his grand-children, it would clearly have been sufficient to carry the whole of his real and personal estate. The court by merely transposing the word "all," so as to make it "all to my grand-children," instead of "to all my grand-children," will give effect to the intention. If the word "all" does not refer to his property, it has no meaning, for the words "my grand-children," would necessarily include all his grand-children.

*Mr. Dowdeswell*, for the nieces, contended, that the two instruments were to be taken together as one, and that the nieces must be included.

*Mr. Agar*, for the heir at law, insisted, that the bill must be dismissed with costs, there being clearly no words to disinherit the heir.

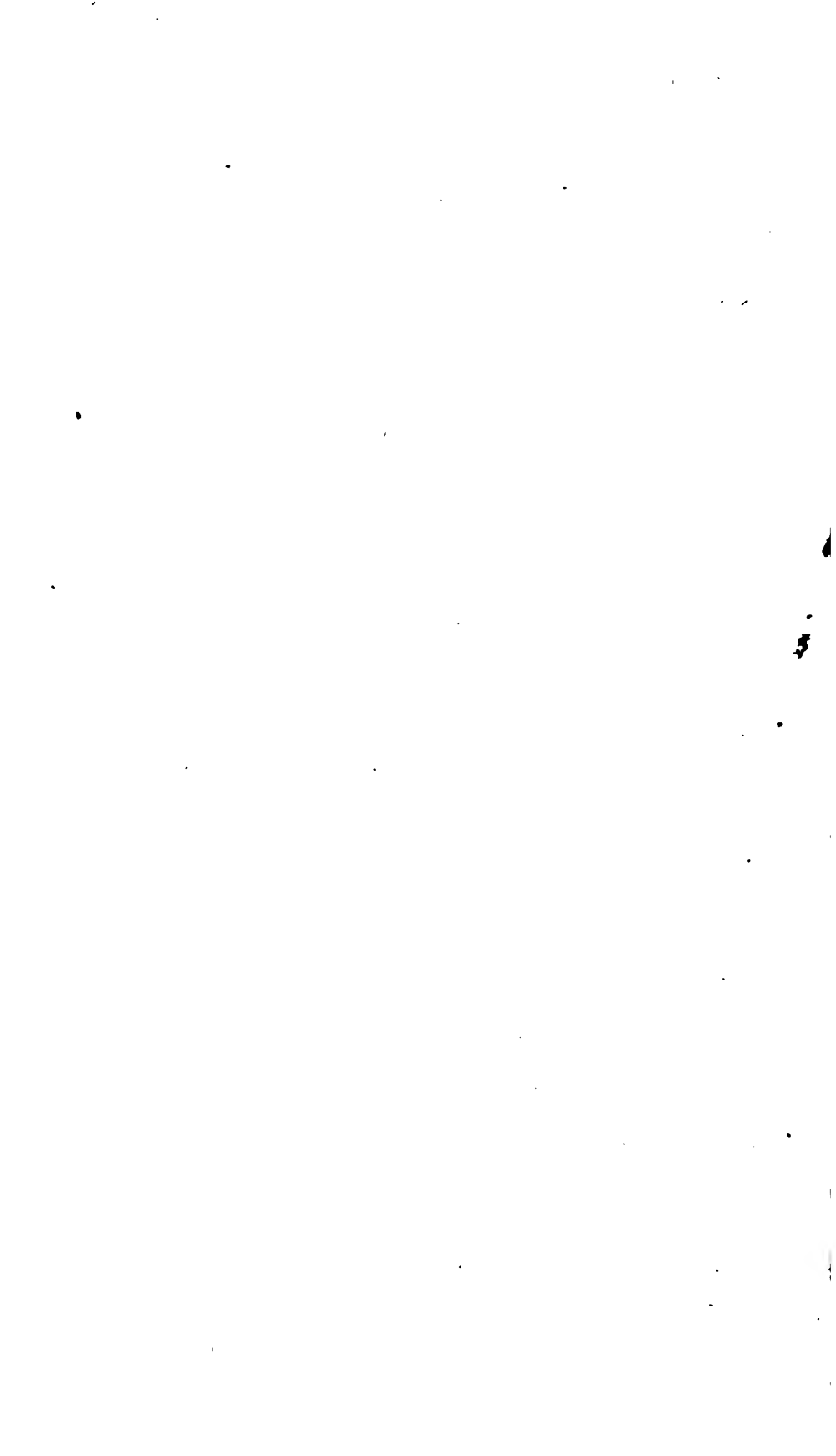
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*The MASTER of the ROLLS* was clearly of opinion that there was no pretence whatever for saying, that this will affected the real estate; that it was unfortunate that there should be so much obscurity, but that every thing was left to guess and conjecture; both as to the persons who were to take, and the property to be taken.

1818.  
  
 MOHUN  
 v.  
 MOHUN.

Bill dismissed against the heir at law and the trustees, with costs; and against the other defendants, without costs.

END OF THE FIRST PART.



# CASES

## IN

# CHANCERY.

**GORDON v. GORDON, FISHER, and BOURKE.**

1818,  
Feb. 20, 21, 23.

**M**<sup>R.</sup> *Agar* moved on the part of the defendant *Janet Gordon*, to discharge an order for reading on the trial of an issue directed at the hearing of this cause, the depositions of *Mrs. Hannah Gordon*, deceased, taken under a commission for examining her *de bene esse*; on the ground that one of the commissioners who took the examination was the solicitor or law agent of the plaintiff, in a suit in the Court of Session in *Scotland*, relating to the same matters which are in dispute in this cause.

Motion by a defendant, to discharge an order for reading on the trial of an issue directed at the hearing, depositions of a witness examined *de bene esse*, on the ground that one of the commissioners was the law agent of the plaintiff, in a suit in *Scotland*, relative to the same subject matter, refused: the motion not being made till after publication, and after the depositions had been read at the hearing.

The bill was filed for the purpose of setting aside, on the ground of fraud and misrepresentation, certain articles of agreement, dated 31<sup>st</sup> March 1790. By an order made in the cause on the motion of the plaintiff, on the 4<sup>th</sup> August 1809, a commission issued for the examination *de bene esse* of *Mrs. Hannah Gordon*. The defendant did not join in the commission; and it was directed to *Harry Lumsden* and *Thomas Gordon*, by whom the depositions in question were taken, on the 24<sup>th</sup> October 1809.



1818.  
  
 GORDON  
 v.  
 GORDON.

At the time of the examination, a suit was and is yet depending in the Court of Session in *Scotland*, in which the defendant *James Gordon* is pursuer, and the present plaintiff is defender, for compelling the implement or specific performance of the covenants contained in the same articles of agreement, which are sought to be set aside by the present suit. It appeared by affidavits of the defendant *James Gordon* and his agents, that *Thomas Gordon*, one of the commissioners by whom the depositions were taken, was the agent or solicitor of the present plaintiff, in conducting his defence in the *Scotch* cause.

The *English* suit came on to be heard before the late Master of the Rolls in *December* 1816, when an issue was directed to try the fact of the plaintiff's legitimacy. The plaintiff in *August* 1817, obtained an order to rehear the cause, and on the 6th *August* 1817, an order was made by the late Master of the Rolls for publication of the depositions of *Mrs. Gordon*, taken under the commission, and that they should be read at the re-hearing of the cause. On the 8th *August*; notice was given by the defendant, of a motion to be made before the Lord Chancellor to discharge that order, and requiring the plaintiff's clerk in court not to pass publication till after the hearing of the motion. The motion was on the 27th *November* 1817 refused by the Lord Chancellor. It appeared by the defendant's affidavit, that the depositions in question were in fact published soon after the order of the 6th *August* 1817, notwithstanding the defendant's notice not to publish them until the hearing of the motion before the Lord Chancellor; but that the defendant had not seen them till the 4th or 5th *December* 1817, at which time he first became acquainted with the fact, that one of the commissioners by whom the depositions were taken, was named *Thomas Gordon*; when he immediately directed enquiries to be made through his agents in *Scotland*, whether he was the same *Thomas Gordon* who was the law agent in  
 that

that country, of the plaintiff in this suit; but on account of the illness of the defendant's agent in Scotland, and other circumstances, affidavits stating the result of such enquiries could not be procured before the 2d February 1818. In the mean time, the plaintiff having obtained the order for re-hearing the cause before the late Master of the Rolls, and for advancing the cause, it was accordingly re-heard, and the depositions read on the 9th December 1817; but his Honour on such re-hearing, directed an issue for the same purpose, and in the same terms, as on the original hearing; and an order was made by the Lord Chancellor on the 12th February 1818, that the depositions of Mrs. Gordon should be read on the trial of the issue.

1818.  
GORDON  
v.  
GORDON.

Mr. Agar and Mr. Roupell, in support of the motion, contended, that inasmuch as neither a solicitor, nor the clerk to a solicitor, for either of the parties in the cause, is competent to act as a commissioner, but the depositions taken before him will be suppressed, the same rule must apply to a solicitor in another cause between the same parties, and relating to the same subject matter. And they referred to *Neute v. Foot* (a), *Fricker v. Moore* (b), *Selwyn's Case* (c), *The King v. Wallace* (d), *Anonymous* (e), and *Cooth v. Jackson* (f). The application to the court could not be made earlier, for until the depositions were published, the defendant had not the means of knowing who were the commissioners; and the re-hearing took place in a very few days after the publication.

Sir Samuel Romilly for the plaintiff, opposed the motion, insisting that the authorities applied only to the case of the commissioner being solicitor in the same cause in which the depositions are to be used, and not to a case like the present,

(a) 2 Rep. in Ch. 393. 2 Dick.  
793. S. C. by the name of *Newton*  
*v. Ford*.  
(b) Buss. 289.

(c) 2 Dick. 563.  
(d) 3 T. R. 403.  
(e) Amb. 252.  
(f) 6 Ves. 12.

1818.  
 GORDON  
 v.  
 GORDON.

where the commissioner was the agent in another cause in which they could never be made use of. It is true that the causes are between the same parties, but in different characters, although the same question may arise in both. The fact of *Thomas Gordon* being one of the commissioners might have been known to the defendant long ago, for the names of the commissioners might have been had on enquiry. The defendant having suffered the depositions to be used at the re-hearing, now seeks, on mere technical grounds, to discharge the order for reading them. The motion is irregular, as being on the part of the defendant *Gordon* alone, and not of all the defendants.

*The LORD CHANCELLOR* in the course of the argument, observed, that from some of the common law books it would seem to have been considered that an order for reading depositions at the trial of an issue was necessary to make the depositions evidence, whereas the effect of the order is merely to make them evidence without the necessity of proving the bill and answer. The parties may make the depositions evidence without any order, by reading the bill, answer, and issue joined, as introductory of the depositions; but the order of this court is an authority to the court of law to receive the depositions without.

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*The LORD CHANCELLOR*, at the close of the argument, directed the solicitors on both sides to attend him on *Monday*, the 23d *February*, at the House of Lords (a), when his Lordship communicated to them his judgment in writing in the following terms :

As far as I have been able to obtain information respecting the practice of the court in a case of this sort, I think that

(a) The Lord Chancellor did not sit in the Court of Chancery on this day, but was occupied in hearing appeals in the House of Lords when

when a deposition *de bene esse*, to the taking of which irregularity of any kind might have been effectually objected before the hearing of the cause, has been read at the hearing, it is of course, if any issue is directed, to order it to be read upon the trial, upon which, it should seem, it would not be evidence, being a deposition before issue joined, without such an order. It is not necessary, if this be so, to determine what is the effect of a person being a commissioner, who was employed in the *Scotch* cause, as Mr. Gordon was. The time was certainly very short between the publishing the deposition and the re-hearing of the cause; but on the other hand, the party should have applied for time to examine whether the depositions published had been regularly taken, (which I think ought, upon a motion, to have been granted, as it seems to be considered in practice as too late to object when the cause is actually re-hearing), even if it had not been known that a person of the name of Gordon had acted as a commissioner, and that fact was known, or might have been known by all concerned, some days before the re-hearing, and would have been a just ground for such a motion; and I think, therefore, according to the practice, the order to read the deposition on the trial cannot now be discharged.

1818.  
GORDON  
GORDON.

MORTIMER v. WEST.  
FORD v. WEST.

Feb. 12.

**B**y an order made in these causes on the 10th December 1817, it was referred to the Master to look into the bills, and ascertain whether they were both for the same matters, and if they were, then to certify which of the bills was most for the benefit of the infants, who were parties, to be prosecuted; with liberty for the Master to state any special circumstances. The Master, on the 24th December 1817,

Where a Master reported that two suits were for the same matter, and that one of them was most for the benefit of infant parties, to be prosecuted, the court would

not stop the other suit, unless on payment of costs, and by consent, there being no decree in either cause.

reported,

1818,  
  
**MORTIMER**  
 v.  
**WEST.**  
 FORD  
 v.  
**WEST;**

reported, that both the bills, so far as they related to the personal estate of *Richard Mortimer*, the testator named in the pleadings, were for the same matters; but that the bill, in the first cause, contained the proper charges, and prayed the proper relief respecting his real estates, which the second cause had omitted to do: For which reason, he was of opinion, that the first bill was the most proper, and for the benefit of the infants, to be prosecuted. It appeared by the statement in the Master's report, that both the suits were instituted by persons claiming to be entitled to the real and personal estates of *Richard Mortimer*, deceased, as devisees and legatees under his will, against his devisees in trust and executors; and the bill in the first suit contained (which that in the second did not) various charges of breaches of trust, and malversation, by the devisees in trust and executors; raised several questions on the construction of the will, and prayed an account of the real and personal estates, that the trustees and executors might be charged for their breaches of trust and neglect, that the rights of all parties in the real and personal estates might be declared, an allowance of maintenance, and a receiver; the bill in the second suit merely praying an account of the personal estate, that the rights of the parties therein might be ascertained, an allowance of maintenance, and a receiver. There had been no decree in either of the causes.

*Mr. Belt* for the defendants, now moved, on the Master's report, that the bill in the second cause might be dismissed with costs, to be paid by the adult plaintiffs in that cause.

*Mr. Hart*, contra, objected, that there was no authority for such an application, and that the court, although it would not suffer both the suits to go on in the names of the infants, could not prevent the other parties from proceeding at their own risk. The plaintiffs in the second cause ought to be allowed their costs out of the estate, and the proceedings may then be stayed.

*The*

The LORD CHANCELLOR said it was clear that both bills ought not to go on. If there are two suits by creditors, and no decree pronounced in either, the court cannot stop either of the suits. In the present case, there not being any decree in either of the causes, you can only stop the second cause on their terms, viz. on payment of their costs.

1818.  
MORTIMER  
v.  
WEST.  
FORD  
v.  
WEST.

An order was made by consent of the plaintiffs and defendants in both causes, that the proceedings in the second cause be stayed; the costs of all parties, as between solicitor and client, to be taxed and paid out of the testator's personal estate; and that in case the plaintiffs in the first cause should delay proceeding therein, the plaintiffs in the second cause should be at liberty to apply to the court for leave to proceed in the second cause, or to have the carriage of the first cause,

PREBBLE v. BOGHURST.

April 25.  
May 2, 4.  
June 2, 9.

**J**OHN PREBBLE, by bond, dated 10th August 1768, became bound to Hans Sloane and John Tilden in 2000*l*, subject to a condition, whereby, after reciting that a marriage was intended between the obligor and Mary Townsend, and that the obligor was to receive, on the marriage with

him, and if his heirs, &c. should pay to the obligees, for her benefit, 1000*l*.; and also, if the obligor should survive his intended wife, and there should be children of her by him living at his death, and his heirs, &c. should pay to the obligees 1000*l*. in trust for the children; "and further, if the obligor should, at any time during his natural life, become seised of any messuages, &c. in possession, and should settle the same upon his intended wife, and the issue of the marriage, by such good conveyances in the law as counsel should advise, in such parts and proportions, and to such use and uses, as should be thought requisite, the better to make a provision for her in case she should survive the obligor." The obligor survived his wife, had several children by her, but did not, during that coverture, acquire any lands in possession: after her death he married a second wife, acquired lands in possession, and died without making any settlement of such lands; held, that the words of the condition were not confined to such lands as he should acquire during the continuance of the first marriage. but a settlement was decreed on the children of the first marriage as tenants in common in fee, of the lands the obligor had acquired after the death of his first wife.

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1818.  
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 FREEMAN  
 v.  
 BOGHEST.

her, 200*l.*, and that she being likewise possessed of or entitled unto a very considerable share or moiety of the personal estate, which was of *Thomas Townsend*, her late father, which, immediately after the decease of her mother *Mary Townsend*, the elder, would come to her daughter; and that, in consideration thereof, and of the love which the obligor bore towards her his intended wife, and for making a provision for her and the issue of the intended marriage, in case the marriage should take effect, the obligor had agreed, not only to pay such sums of money to such persons, and at such times as were thereafter expressed, but had also agreed, that if, at any time during his natural life, he should be seised of any messuages, tenements, lands, and hereditaments, in possession, that he would, by such good conveyances in the law as counsel should advise, settle the same upon the said *Mary* and the issue of the marriage, in such parts and proportions, and to such use and uses, as should be thought requisite, the better to make a provision for her in case she should survive the obligor: It was declared, that the condition was, that if the marriage should take effect, and *Mary Townsend* should survive the obligor, then, if the heirs, executors, administrators, or assigns, of the obligor, should, within three months next after his decease, pay to the obligees, their executors, administrators, and assigns, 1000*l.* in trust and for the only use of *Mary Townsend*, her executors, administrators, and assigns, to be by her and them peaceably and quietly held and enjoyed, and to be disposed of to her and their own proper use and uses for ever; and also, if the marriage should take effect, and the obligor should survive his wife, and there should be any child or children of her by him begotten, living at the time of his decease, then, if the obligor's heirs, executors, administrators, or assigns, paid to the obligees, their executors, &c. 1000*l.* in trust, nevertheless, and to the intent to pay and dispose of the same unto and amongst all and every the son and sons, daughter and daughters, of *Mary Townsend*,

by

by the obligor, in equal shares and proportions, if there should be more than one, and if but one, then wholly to that one, at their respective age or ages of twenty-one years, and in the mean time to apply the interest arising from that sum for the sole use and benefit of such son and sons, daughter and daughters, equally, if more than one, and if but one, then wholly to the use and behoof of that one; and further, if the marriage should take effect, and the obligor should, at any time during his natural life, become seised of any messuages, tenements, lands, and hereditaments, in possession, and should settle the same upon *Mary Townsend*, and the issue of the marriage, by such good conveyances in the law as counsel should advise, in such parts and proportions, and to such use and uses as should be thought requisite, the better to make a provision for her, in case she should survive the obligor, then the bond to be void.

1818.  
  
*PREBBLE*  
 v.  
*BOGART.*

The marriage took effect, and the plaintiffs were the issue of that marriage. *Mary Prebble*, formerly *Townsend*, died in 1775, and her husband did not, during the continuance of his marriage with her, become seised of any hereditaments in possession. In 1782, the obligor married a second wife, the defendant *Ann Prebble*, by whom he had issue several children, who were defendants in the suit. After his second marriage, he became entitled to considerable real estates in possession.

*John Prebble* died, having by his will devised his real estates for the benefit of the defendants his widow and the children of his second marriage: And the bill was filed against them by the children of the first marriage, praying a settlement and conveyance of the estates, pursuant to the condition of the bond.

At the hearing, a case was directed to be made for the opinion of the Judges of the Court of Common Pleas, in which the question proposed was, whether, according to the intent



1818.  
  
 PREBBLE  
 v.  
 BOSNORST.

intent of the condition of the bond, the obligor would commit a breach of the condition, if he did not make a settlement of the subsequently acquired estate upon the issue of the first marriage. The case having been argued in the Court of Common Pleas on the 30th April 1817 (a), the learned Judges of that court certified their opinion, that according to the true intent and meaning of the condition, *John Prebble* having survived *Mary Prebble*, formerly *Townsend*, would not commit a breach of such condition, if he did not make a settlement of the subsequently acquired estate upon the issue of the first marriage.

The cause now came on for further directions before the Lord Chancellor, assisted by Lord Chief Baron *Richards* and Mr. Justice *Abbott*.

*Sir Samuel Romilly*, Mr. *Hart*, Mr. *Bell*, and Mr. *Wakefield*, for the plaintiffs, contended, that even supposing this were the case of a will, it would be impossible for the court to controul the express words, "at any time during the life of the obligor," so as to confine them to a particular period of his life; but that, in a question on a bond, the court would adhere much more strictly to the words of the instrument, than in one which arises on a will. The condition provides for three events, or rather makes a disposition of the property in three different cases: first, if the husband shall die in his wife's life-time, then his executors are to pay 1000*l.* for her use; secondly, if the obligor should outlive his wife, and there should be any children by the marriage, in that case, 1000*l.* is to be paid at the obligor's decease for the use of those children: and the third case in the condition, and which is completely absolute, and not coupled with or depending on any contingency of survivorship, is that on which the present question arises, viz. if the marriage should take effect, and the obligor should, "at any time during his life," become

(a) 7 Taunt. 538.

reised of any messuages, &c. in possession, and should settle the same on his wife and the issue of the marriage, by such good conveyances in the law as counsel should advise, in such parts, &c. and to such use and uses as should be thought requisite, the better to make a provision for *Mary Townsend*, in case she should happen to survive *John Prebble*." The latter words cannot be construed absolutely, they must be taken with reference to that part of the provision which is for the benefit of the wife, but they cannot controul the operative part of the condition which relates to the issue. They must be understood as applicable to only one of the several objects of the provision. The words were unnecessary, because the wife could not be entitled to any provision unless she survived the husband. The provisions of this instrument are for the benefit of the issue as well as of the wife, and there could be no reason why the circumstance of her survivorship should destroy the other parts of the provision. It would be to put a violent construction on this clause, to hold that the whole provision is to depend on that event; to contend for such a construction, is in effect to call on the court to insert the words "if she shall happen to survive her husband." But it is also contended for the defendants, that the condition is to be construed as extending only to such real estate as the obligor should become entitled to during the joint lives of himself and *Mary Townsend*: but the words of the instrument do not warrant any such construction. It is expressly provided, that he is to settle all lands, &c. he shall acquire "at any time during his natural life;" which words the court cannot be warranted in restraining to a particular period only of his life, viz. the joint lives of himself and *Mary Townsend*. The construction contended for by the plaintiffs is also supported by the recital, which expressly states the agreement to have been, not only to pay the sums of money, but also to settle such lands as he should become entitled to during his life, referring to exactly the same sort of settlement as is provided in the operative part

1818.  
  
*PREBBLE*  
 v.  
*BOGMYER*.

of

1818.  
  
 PATERSON  
 v.  
 BOCHURST.

of the condition. It will be contended, however, that it cannot be supposed that the obligor meant to put it out of his power to make any provision for the children of a subsequent marriage. But the court is not at liberty to take into consideration any supposed or conjectural intention of the obligor; the construction must depend on the words of the instrument itself. It is probable, however, that the obligor did not foresee or anticipate any second marriage. Besides the bond does not render it imperative on the party to lay out his money in lands; it does not apply to money, or even to leasehold lands; out of both these descriptions of property he was left at liberty to provide for the issue of a second marriage.

Mr. Solicitor-General, Sir Arthur Pigcott, Mr. Roupell, and Mr. Wingfield, for different defendants in the same interest, submitted that the decision of the Court of Common Pleas was right, and that the condition was to be construed here as in a court of law. It is an established rule, that the condition of a bond is to be construed favourably for the obligor. It is so laid down by Lord Coke in *Laughter's* case (a), and is supported by other authorities. If, therefore, the intention be dubious, that construction which is beneficial to the obligor is to be preferred. When the whole of this instrument is attended to, it appears to have been the intention to settle such lands only as he should acquire during the coverture: and not to settle any lands except lands wherein his intended wife was to be entitled to some beneficial interest. He contemplated only lands in which his wife was to have an interest. The words "the better to make a provision for her in case she should survive her husband," qualify the generality of the preceding words, and make them applicable only to lands which could be settled on the wife, viz. lands which he should acquire during the coverture. It was his primary object to provide for his wife, and nothing

(a) 5 Rep. 21 b.

was intended to be done in which she was not to have an interest.

1818,  
FREBBLE  
v.  
BOGHURST.

The LORD CHANCELLOR, in the course of the argument, and at its conclusion, made several observations to the following effect:—When this cause came back from the Court of Common Pleas, I doubted a good deal whether the true construction of this instrument had been put upon it. It struck me, that the argument in that Court did not unfold all the difficulties. I did not mean when this case went to the Common Pleas to ask for more (nor do I now mean to trouble the learned Judges for more) than an opinion merely, whether, according to the intent of the condition of this bond, an estate called *Black Actz*, to which the obligor became entitled after the death of *Mary* his wife (late *Townsend*), ought or ought not to be settled on the children of that marriage. The way in which it struck me was this; this gentleman, on his marriage, was to become entitled to 200*l.* absolutely; his intended wife was also entitled to a reversionary share or moiety of the personal estate of her mother. What the obligor's interest was in that, during the coverture, or what he could have done with it, it is not necessary to state, but it was part of the consideration for the bond, and there is also the consideration of marriage. But we have nothing to do with the consideration; and I am somewhat surprised to see, that in the argument in the Common Pleas, much was said about the reciprocity of consideration. The recital is, that he was to make this settlement of any lands he might become seized of during his life for the benefit of his wife and issue; and I take it to be clear, that if she had died immediately after the marriage, and had left issue, he would be bound to make the settlement for the issue. He binds himself, if she should survive him, to pay 1000*l.* to her; and, as far as that goes, there is no provision for the children in that event, nor indeed any provision here for the children, until we come to the death of the husband. He then


1818.  
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 PREBBLE  
 v.  
 BOCHUMPT.

then takes up the consideration of the contingency of his wife dying in his life-time, leaving children; and in that case, the 1000*l.*, which, in the former event, was to go wholly to her, is to go to the children, and he states the proportions in which it is to be divided among them. He then takes up the consideration of what is to be done with the estates of which he should become seised. It is clear to me, that this condition would not have embraced copyholds or leaseholds, and it was left entirely to his own discretion, whether he would become entitled to any thing by purchase. It only could affect lands of which he should become "seised in possession." He had before recited that his intention was not only to settle for the benefit of the wife, but also of the issue. He then proceeds to state what he is to do on either of the contingencies of his surviving his wife, or of his wife's surviving him; and he goes on to say, that if, at any time during his natural life, he should become seised of lands in possession, he will convey and assure the same "in such parts and proportions." The word "such," therefore, has reference to something before said as to parts and proportions: he then recollects that those words alone are not sufficient, though they might be sufficient should his wife be dead at the period contemplated by this instrument. He therefore adds the words "and to such use and uses, the better to make a provision for the said *Mary Townsend*." Then the question will be, whether, upon the whole, he did not mean this;—that if his wife should survive him, she should have 1000*l.* absolutely;—if she did not survive him, the 1000*l.* should go to the children of the marriage;—if she did not survive him, the land should go to the children;—and if she did survive him, the land was then also to go to the children, but in such parts and proportions, and to such use and uses, as would be best calculated to make a provision for the wife. It struck me that the condition of the bond was clearly capable of this construction, and I have therefore thrown out these observations.

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I entertain no doubt whatever, not speaking merely from the form of the certificate, that the opinion of the Court of Common Pleas was founded on this; that according to the true meaning of the condition, there would be no breach, except by a non-conveyance of lands of which the obligor should be seised in possession during the life of *Mary Townsend*: and I think they meant to mark that opinion by these words in the certificate, "the said *John Prebble* having survived the said *Mary Prebble*, formerly *Mary Townsend*." If these words were not so intended, I may venture to state that I know that to have been their unanimous opinion. When the cause came back to me, it was my duty to form my own opinion upon it, and if I could have adopted the opinion of the learned Judges of the Court of Common Pleas, I should have felt great relief in doing so, but I thought then, and I continue to think, that the case requires further consideration. I do not consider it necessary to make any observations relative to the supposed hardship of this case. I could easily put a case in which it would not have been difficult for the obligor to have contrived to distribute his property in a way which would have produced much greater hardship to the children of the first marriage, than this is supposed to occasion to the children of the second; but with considerations of this nature the court has nothing to do. This obligation seems to be threefold. The two first acts were not to be done by the obligor during his life, for the payments are to be made by his representatives after his decease, and there were in contemplation two contingencies; first, the wife's surviving him; and secondly, her predeceasing him. In the first case she was to have 1000*l.*, in which the issue were not to participate; in the second they were to have 1000*l.*, and in which she could not participate. Then comes that part which relates to real estate, not to any which he might then have, but to real estate to which he should become entitled; that if he should, at any time during his life, become seised of any messuages, &c. in possession,

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1818.  
  
**PREBBLE**  
 v.  
**BOGHURST.**

1818,  
  
 PREBBLE  
 v.  
 ROGHURAT.

he would settle the same upon his intended wife, and the issue of the marriage, as counsel should advise. If he had gone no further than this, I apprehend it would not have followed either according to the legal or equitable construction of the condition, that having agreed to settle it upon her and the issue, if he became entitled to it after her death, there should therefore be no settlement. And the question will be, whether the subsequent words, "in such proportions, and to such use and uses as should be thought requisite, the better to make provision for her in case she should survive him," are to narrow the benefit the issue would have taken under the former words, and reduce the effect of that part of the condition, to estates he should become entitled to during her life.

With these remarks, I may put the question thus for the opinions of the learned Judges who are present, viz. "If *John Prebble*, after the death of *Mary Townsend*, became seized in possession of an estate called *Black Acre*, and made no settlement of it on his issue by her, whether, attending to the legal construction of the condition of the bond, there was a breach of the condition?"


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May 2.

The Judges having taken time for consideration, now delivered their opinions in substance as follows:—

ABBOTT J. After considering this case, and hearing the very full and able discussion which took place at the bar, I am of opinion that the obligor did commit a breach of the condition. I have not formed this opinion without reluctance, because I am aware that I differ from the learned Judges of the Court of Common Pleas; I hope, however, that I shall not have the further misfortune of differing from your Lordship and the Lord Chief Baron. The terms of this instrument have been so recently before the Court, that I do not think it requisite to state them any further than as they may be necessary

nessary to shew the grounds on which I proceed. I think the second marriage and the circumstance of there being children by that marriage, are facts not material to the question, for the answer to your Lordship's question must depend on the words of the bond, and the intent of the obligor must be the same in the present state of facts as it would have been if there had been no second marriage or no issue by that marriage. There is no allusion to a second marriage in the bond, and it is probable he did not contemplate a second marriage, for second marriages are very seldom thought of upon occasions of this kind. If these facts, therefore, are immaterial, the topics urged by some of the counsel must be excluded from our consideration. This instrument manifests throughout a general intention of providing for his intended wife and the issue of the intended marriage, if such issue there should be. To do this, he proposes two modes; first, by the payment of a specific sum of money, 1000*l.*; and secondly, by settling any real estates, if he should be seised of such in possession. Whether that settlement is to depend on the contingency of her survivorship and of his being seised during her life, is the question. The payment of the 1000*l.* is not to depend on that contingency; it is to be for her use absolutely if she survived the husband; if she died before him, leaving issue, it is to be paid for the benefit of the children. These two events are made the subjects of two distinct clauses. The condition then provides for the settlement of the real estate, if he should be seised of any: "that if at any period during his life, he should become seised of any messuages, &c. in possession, and should convey, settle, and assure the same upon the said *Mary Townsend*, and the issue of the intended marriage, by such good conveyances in the law as counsel should advise." If it had stopped here, and concluded with the words "then this obligation shall be void," it might possibly have been matter of controversy in what manner the estate was to be settled; but the bond would have been forfeited if he had died before her without making

1818.  
  
 PRESSLE  
 v.  
 BOGHURST.



1818.  
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 PREBBLE  
 v.  
 BOGHURST.

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this settlement on the wife and issue, or if he had survived her, and had not made the settlement on the issue, always assuming that he had acquired a real estate during his life. For the purpose of obviating these doubts, the words "in such shares and proportions, and to such use and uses, as should be thought requisite, the better to make a provision for *Mary Townsend*, if she should survive and overlive *John Prebble*," are introduced. Whether these words meant that the wife should take the whole, with remainder to the issue, or that they were to take jointly, it may not be easy to determine; but it is evident a discretion was to be exercised, and she was in all events to take some beneficial interest during her life if she survived the husband. These words, it appears to me, are for no other purpose than to shew that the interest which the wife was to have during her life, was to be a substantial and not merely a nominal interest. The words which are supposed to make the settlement depend on the contingency of *Mary Townsend's* surviving the obligor, do not govern the whole clause, but are, in my opinion, applicable only to the amount of the shares to be taken by the different objects of the provision, and to the limitations of uses to be introduced into the settlement, and which must necessarily have depended in some measure on that event. The construction contended for on the part of the defendants would also make it necessary to narrow the meaning of the words "during his natural life," and to consider them merely as meaning "during the joint lives of himself and *Mary Townsend*;" words so obvious, that I think they must have occurred to the obligor had such been his intention. I think the construction I have put on this instrument gives effect to every part of the clause, and that the condition required him to make a settlement of all the real estates he might be seised of in possession during his life, on the wife and children, in such a way as to make a suitable provision for his wife; not merely a formal settlement for her, but a settlement really beneficial to her, if she should survive him. For these

these reasons, I am of opinion that he did commit a breach of the condition.


1818.

PREBBLE  
v.  
BOGHURST.

**RICHARDS Ch. B.** I entirely concur in the opinion given by my learned Brother *Abbott*, and for the reasons which he has assigned. It is clear from the recital in this condition, that in consideration of the marriage and of the property which the intended husband was to become entitled to in right of his wife, he agreed to provide for the wife and the issue of that marriage. That it was his object to make provision for her and the issue, is declared in the recital; and there is no doubt that the issue were entitled to be considered as purchasers of every benefit intended for them by the condition. Then he proceeds to recite, that he had agreed, that if at any time during the term of his natural life (not during the intended coverture), he should become seised of any real estates, he would, by such good conveyances, &c. as counsel should advise (not as he himself shall think fit, for nothing is left to him but to settle), settle the same real estate upon *Mary Townsend*, and the issue of the intended marriage, in such parts, &c. and to such uses, &c. as should be thought requisite, "the better to make a provision for the said *Mary Townsend*, in case she should happen to survive and overlive the said *John Prebble*." It is to be settled by such good conveyances as counsel shall advise, or in default of counsel, as a court of equity should decide; nothing is to be left to the party himself. The recital also states, that the settlement is to be made on the said *Mary Townsend*, and the issue of the intended marriage, "in such parts and proportions, and to such use and uses, as should be thought requisite, the better to make a provision for the said *Mary Townsend*." The counsel or the court were therefore to decide what ought to be a proper settlement as to the interests the wife and the issue were to have; and whatever was to be given to the wife, was to be "the better to make a provision for her in case she should survive the said *John*


N 2


*Prebble*."

1818.  
  
 PREBBLE  
 v.  
 BOGHURST.

act to be done by himself during his life. It provides for the wife in the first instance by an act that is to be done by his representatives, viz. that, three months after his decease, there is to be a payment of 1000*l.* for the sole use and benefit of *Mary Townsend*, in case she should survive him; and it then provides for another act which is also to be done, not by him, but by his representatives, viz. that if his wife does not survive him, and, at the time of his decease, there should be any children of the marriage, his executors are to pay 1000*l.* to trustees for the use of the children. It is further to be observed, that, as far as the terms go hitherto, there is an express contemplation of the coverture ceasing by his surviving the wife, and also an express contemplation of its ceasing by his predeceasing the wife, so that the duration of the coverture, and its determination either by his surviving her, or the contrary, are expressly recognized, and these two provisions being made with a direct reference to a determination of the coverture in either of those cases, then follow the words on which the doubt arises, and it strikes me as remarkable, that though he had just before been speaking of the determination of the coverture in both ways, by either of the parties surviving the other, if he meant that the subsequent part of the condition should also have reference to the coverture, he has not in the latter clause introduced any words relative to the duration of the coverture, except the words towards the conclusion of the clause. If the clause relative to the settlement of the real estates had stopped immediately after the words "by such good conveyances, &c. as counsel shall advise," there would have been no doubt; but then follow the words "in such parts and proportions, and to such use and uses, as shall be thought requisite, the better to make a provision for her the said *Mary Townsend*, in case she should happen to survive and overlive the said *John Prebble*." And the question is, whether these last words have so qualified the introductory words "at any time during his life," as to shew that the intent was to fix the obligation

obligation on those lands only which he might become seised of during the coverture, or, on the other hand, whether those introductory words are to have the meaning which naturally belongs to them, and to affect lands of which he should become possessed at any time during his life. The case has been represented as a case of hardship, because the facts that have taken place are these; *Mary Townsend* died, and *John Prebble* afterwards married, and had issue by the second marriage, and the children of the first marriage contend, that the lands acquired by their father during the second coverture are affected by this obligation. It may perhaps operate as a hardship, but unless the hardship can amount to so much inconvenience and absurdity as to call upon a Judge to declare judicially that such could not have been the intention of the parties, it cannot affect the determination of this question. The question indeed might have arisen, if there had not been a second marriage, because, if after the determination of the first coverture, he had continued a widower, and had purchased lands, they would not be lands of which the wife could have had any benefit, and the question then might have arisen between the eldest son and the other children of that marriage. It is impossible to deny, as was observed by one of the learned Judges, that in most cases, persons, on entering into a first marriage, do not advert to the probability of a second, but frequently devote their whole property to the wife and children of the first. In this case, if the wife had survived him, the children would have taken no pecuniary provision; and yet the husband might have possessed himself of the fortune of the wife: and he had the power of preventing the operation of this instrument by purchasing copyhold or leasehold estates. It is contended under the words which conclude the clause in question, that the true intent and meaning of this obligation is, that he should settle only the lands he should acquire during the first coverture, in other words, lands of which the wife could have had the benefit. I have looked repeatedly at the instrument,


1818.  
  
**PREBBLE**  
 v.  
**BOGHURST.**

1818.  
  
 PREBBLE  
 v.  
 BOGHURST.

instrument, and I cannot give my assent to the opinion, that such is the true construction, for looking at the instrument from the beginning to the end, the recital is to make a provision for the wife and the issue; there is a money provision for her if she survive, and for the children in the contrary event. These are not provisions with respect to any acts that are to be done during the life-time of the obligor. There is therefore an express contemplation, with respect to the money provision, of her surviving him in the first instance, and not surviving him in the second. Having contemplated these two events, he then introduces the obligation as to the settlement of lands, and expressly says, though without any reference whatever to the continuance of the coverture, as in the first instance, that if at any time during his natural life, he shall become seised of any real estates, they shall be settled for the benefit of the wife and issue. Now it is not contended, that if these lands had come to him during the coverture, the children of the first marriage would not be entitled to them; that they would be so entitled is perfectly clear, but then come the words "in such parts and proportions, and to such use and uses, as should be thought requisite, the better to make a provision for her the said *Mary Townsend*, in case she should survive and overlive the said *John Prebble*." Here again he adverts to the circumstance of his wife outliving him, and of his death putting an end to the coverture; and the question is, on the whole, whether he did not mean this: that as far as the money provision was to be made, 1000*l.* was to be for the wife absolutely, if she survived; and 1000*l.* for the children, if she did not survive; but that with respect to the lands, he did not mean to extend the benefit to his wife wholly, if she should survive, nor to the children wholly in that case, but that they should be the subject of settlement on both: and it could not be contended, that as the settlement was for both, and one of the objects of settlement was out of the world, the children could not take. If that were the doctrine, this case

would.

would be out of Court ; but as I apprehend the money is for one in one event, and for the other in another event ; so that these lands are to be settled on both,—if the wife dies, the children shall take them, and if she lives, then they shall be taken by both, as far as circumstances will permit ; if living, to be taken by both, in such parts and proportions, and to such use and uses, &c. as that she may have the better provision. Upon repeatedly reading this instrument over, and after frequent consideration of the case, this seems to me to be the right construction ; and however I may lament the difference of opinion that has obtained, I am judicially bound to declare my opinion, that this instrument affected all the lands of which the obligor became seised during the term of his life.

1818.  
  
**PREBLE**  
 v.  
**BOGHUMST.**

A question afterwards arose respecting the interests which the children of the first marriage were entitled to in the real estates. It was contended by *Sir Samuel Romilly* for the plaintiffs, that the true construction of the condition was to give them in equity estates as tenants in common in fee, and by *Sir Arthur Pigott* for the defendants, that the plaintiffs took as tenants in common in tail, with cross remainders, and with the ultimate reversion, as remainder to the settlor in fee.

June 24

*The LORD CHANCELLOR* said, he thought the word “issue” in this case meant child or children, sons or daughters, and that the wife not having survived the husband, the conveyance should be to the children as tenants in common in fee : that the words “parts, shares, and proportions,” seemed to have reference to something of the same kind as was before provided respecting the 1000*l.* viz. to the children equally, if more than one, and if but one, to that one ; and that the trust of the money afforded an interpretation as to the shares and interests they were to take in the real estate. That as they

1818.  
~  
PREBLE  
v.  
BOGHURST.

they were to take the 1000*l.* equally, and to take it absolutely, they were to take the land in the same manner. His Lordship added, that the question was not easy to determine, and that he would give it further consideration.

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June 9.

*The LORD CHANCELLOR.* I remain of opinion, on the construction of this bond, that the settlement was to be made in one or other of two ways; either, first, on the unborn children of the first marriage, as tenants in common in tail, with cross remainders, and with remainder to their father in fee, and which the children being of age might of course destroy;—or, secondly, that the settlement of the real estate was to be on the children of the first marriage, as tenants in common in fee. And taking the whole bond together, the latter appears to me to be the true construction. This is my opinion on a case in which there is ambiguity enough to make other persons think differently. In whichever of these ways it is considered, it is equally fatal to the claims of the children by the second marriage.

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CRAWSHAY v. MAULE.  
MAULE v. CRAWSHAY.

1818,  
June 9, 18, 27,  
July 31.

**R**ICHARD *Crawshay*, by his will, dated September 26th 1809, after giving several legacies, gave to *Joseph Bailey* 25,000*l.*, "to be transferred from my account in the ledger to his, intended as a capital for him to become a partner with my executor of one-fourth share in the trade of all those works *so long as the lease endures*, with the principal and profits growing therefrom, to be his own for ever." And he gave to *Benjamin Hall*, Esq. and his wife, of *Abercarne*, and to their heirs for ever, all the residue of his real and personal estates, and appointed *B. Hall* sole executor. The testator made a codicil, dated 4th May 1810, whereby he gave to his son *William Crawshay* (the plaintiff in the first and the defendant in the second cause) "Three Eighth shares of the concerns at this iron work and of the premises at *Cardiff*, so the partnership will stand, at my demise, *William Crawshay* 3-8ths, *Benjamin Hall* 3-8ths, *Joseph Bailey* 2-8ths."

A testator entitled by leases of unequal duration, to iron mines and works, by will gave a pecuniary legacy to *B.* "as a capital for him to become a partner with my executor of one-fourth share in the trade of all those works *as long as the lease endures*," and gave all the residue of his real and personal estates to *H.* and his wife, and appointed *H.* executor. By a codicil he gave to *C.* "3-8ths of the concerns at this iron work

The testator, at the time of his death, was entitled in equity to various lands, mines, and veins of coal and iron, at

and of the premises at *C.*, so the partnership will stand, at my demise, *C.* 3-8ths, *H.* 3-8ths, *B.* 2-8ths." Held, 1. That this did not create a partnership co-extensive with the duration of the leases. 2. That by the codicil, three-eighths of the mines, &c. became vested in *H.* solely, and were taken out of the operation of the general devise in the will to *H.* and his wife.

*C.*, *H.*, and *B.*, jointly carried on the works for two years after the testator's death, selling iron manufactured by them not only from ore procured from the testator's mines, but from ore and old wrought iron which they purchased, but not merely for the purpose of mixing with the produce of the testator's mines for improving the iron. *C.* at the end of the two years, purchased *B.*'s share, and the business was carried on in the same manner by *C.* and *H.* till *H.* died. There was no written or other agreement for the duration of the partnership:

Held that this was not a mere joint interest in the produce of land, but a trading partnership; that it was dissolved by the death of *H.*, and that the fact of *C.* and *H.* having purchased and taken assignments to a trustee for themselves, of some of the rents reserved by the leases, did not furnish any inference of an agreement to continue the partnership for any definite period; and a sale of the property was ordered on motion.

*Semble*, that this was a trading within the meaning of the bankrupt laws.

*Cyfartha*



1818.  
  
 CRAWSHAY  
 v.  
 MAULE.  
 MAULE  
 v.  
 CRAWSHAY.

*Cyfartha* and other places in the counties of *Brecon* and *Glamorgan*, with extensive buildings and machinery, for the residue of several long terms of years, which would expire at distinct periods of time; and, for several years before and up to the time of his death, carried on upon those premises, works for getting iron ore and coal, and manufacturing the iron ore into bar iron; he was also entitled to a leasehold wharf at *Cardiff* used for shipping the iron.

The testator's interest in the mining property and works was thus circumstanced. By articles of agreement, dated 31st of *July* 1794, *Anthony Bacon*, in whom the leases were then vested, agreed to assign all his interest to the testator, subject to the payment, after the 29th of *September* 1815, of a yearly rent of 5000*l.*, and also 15*s.* per ton for all pig iron above 6400 tons made yearly on the premises. In 1800, the testator intending an extension of the works, proposed to *Bacon* that the 15*s.* per ton should cease at 10,700 tons, which proposal was acceded to by *Bacon*; but he having afterwards refused to carry it into execution, a bill was filed by the testator for a specific performance, which was accordingly decreed in *March* 1810, and *Bacon* was ordered to execute to the testator an underlease for all the terms which *Bacon* and his trustees had in the premises, except the last day thereof, subject to the yearly payments mentioned in the agreements.

The testator died before any underlease was executed pursuant to the decree, and on his death, the plaintiff, together with *Hall* and *Bailey*, took possession of the works, and continued to manage and carry them on in the names or firm of "*Crawshay, Hall, and Bailey*," till *October* 1812, when the plaintiff purchased *Bailey's* share, which, on the 1st *July* 1814, was duly assigned to him. From *October* 1812, till the death of *Hall*, which happened on the 31st *July* 1817, the iron works were carried on by the plaintiff and *Hall*, in the names of "*Crawshay and Hall*," and in the same manner as before the plaintiff purchased *Bailey's* share. It appeared

peared that no written articles were ever entered into either between the plaintiff and *Bailey* and *Hall*, whilst they were all interested, or between the plaintiff and *Hall* after *Bailey* ceased to be interested. On the 21st of *May* 1814, *Bacon* and his trustees, pursuant to the decree, demised all the mines, &c. to *Hall*, his executors, &c. for the residues of the terms granted by the original leases, except the last day of each term, at the yearly rent of 5000*l.*, and also 15*s.* per ton for every ton of pig iron and castings to be made yearly on the premises above 6400 tons, but any number exceeding 10,700 not to be taken into account, the tonnage not being to be paid on more than 4300 tons above the 6400. *Hall* by a deed indorsed on the underlease, declared that he would stand possessed of the premises, as to three-eighths for his own use, and as to the remaining five-eighths, in trust for *Richard Crawshaw*; the deed also contained mutual covenants by the parties for payment of their proportions of the rents, and for the indemnity of each other.

On the 23d of *May* 1814, *Bacon*, in consideration of 32,000*l.* paid by *Crawshaw* and *Hall*, viz. three-eighths by *Hall*, and five-eighths by *Crawshaw*, assigned to *Joseph Kaye* the rent of 15*s.* per ton reserved by the underlease; and to become due during the remainder of the term, but in trust as to three-eighths for *Hall*, and as to five-eighths for *Crawshaw*; and by another deed of the same date, *Bacon*, in consideration of 62,500*l.* paid to him by *Crawshaw* alone, assigned to *Kaye*, his executors, &c. the reversionary interests of one day reserved to him by the underlease, and the yearly rent of 5000*l.* thereby reserved; to hold to *Kaye*, his executors, &c. in trust for *Crawshaw*, his executors, &c. for his own use and benefit.

*Hall* died on the 31st *July* 1817. By his will, dated the 8th of that month, he devised all his freehold, copyhold, and leasehold estates (except trust and mortgage estates, and the estates in which he was interested as a partner in the co-partnership in which he was engaged with the plaintiff at *Cyfartha*)

1818.  
CRAWSHAW  
v.  
MAULE.  
MAULE  
v.  
CRAWSHAW.

1818.  
 ~~~~~  
 CRAWSHAY  
 v.  
 MAULE.  
 MAULE  
 v.  
 CRAWSHAY.

*Cyfartha*) to George Maule, Joseph Kaye, and John Llewellyn, (defendants in the first and plaintiffs in the second cause,) upon various trusts for payment of debts and legacies, and for the benefit of his children. He then declared, that if he should have one or more son or sons living at his decease, or born in due time after, but no such son should then have attained the age of twenty-one years, it should be lawful for his trustees to carry on the iron works, and other mercantile or trading concerns in which he should be concerned at his decease, if they should judge it for the benefit of the persons interested in his property under his will that the same should be carried on; and that if they should think it advisable to carry them on, then, during such time as his having such a son should be in suspense, it should be lawful for them to permit any part of the stock in trade, or effects which should be employed in, or belonging to the said works or concerns, at his decease, to be employed in carrying on the same, and he exempted the stock in trade and effects so to be employed, from the payment of his debts, to the extent and in manner particularly mentioned in the will.

The testator further declared his will to be, that if the son who first or alone should attain the age of twenty-one years, should be desirous to have the said iron works and concerns, or any of them, continued, and should signify the same to his trustees by any writing under his hand, then the amount of the stock or effects then employed therein, should be valued, and his said son should pay or secure the amount of the valuation to his trustees in manner therein mentioned. The testator, after directing the application to be made by his trustees during the suspense of his having a son who should attain twenty-one years, of the profits of the iron works, and the application of the money to be paid or secured by his son as before-mentioned, declared, that if his iron works and other concerns should be so carried on as before-mentioned, and the son who first or alone should attain the age of twenty-one years, should decline to carry on the same, or to give

give such security as before-mentioned, for the stock and effects employed in and about the same, or if while it should be in suspense whether he should have any such son, his trustees should deem it advisable to discontinue the said iron works and concerns; in either of those cases, the said iron works and concerns should be discontinued, and the stock and effects employed therein should be sold and disposed of in such manner as his trustees should judge prudent and reasonable; and the money arising from such sale, and the gains and profits previously arising from the said iron works and concerns, should be disposed of in the manner in which he had directed the said gains and profits, and the money to be paid or secured by his said son, in the event before-mentioned, to be paid or applied, or as near as the circumstances would admit; and he appointed *Maule, Kaye, and Llewellyn*, his executors, and guardians of the estate of his children; he also appointed them, together with his wife, guardians of the persons of his children: and he empowered his trustees to employ servants, clerks, or any other persons, in the management of the said iron works and concerns, at such salaries as they should think proper, and to repose in such persons such confidence, trust, power, or authority, in the conducting and carrying on the same trade or business, and in the management, care, and disposal of the estate, employed or to be employed therein, and in the receipt of any debts to be contracted in the trade thereby directed to be carried on, as his trustees should in their discretion think fit.

Soon after the death of *Hall*, a written notice was sent to his executors by *Crawshay*, that he considered the partnership as dissolved by that event, and that he would not consent to carry on the business with his representatives.

The bill in the first of the above causes was filed by *William Crawshay* against the executors of *Hall*, praying a declaration, that the co-partnership or joint concern between the plaintiff and *Hall* in the iron works, and all the trade and business thereof, became absolutely dissolved, determined, and

1818.  
CRAWSHAY  
v.  
MAULE.  
MAULE  
v.  
CRAWSHAY.

1818.  
 CRAWSHAY  
 v.  
 MAULE.  
 MAULE  
 v.  
 CRAWSHAY.

and put an end to, by the death of *Hall*, or from that period; praying also an account, and that the balance, after satisfying the partnership debts, might be ascertained, and divided between *Crawshay* and the representatives of *Hall*, according to their respective proportions; a sale of the partnership property, and a division of the proceeds.

The executors of *Hall*, by their answer, insisted that they were entitled to the leasehold premises and iron works, as tenants in common with *Crawshay*, for the residue of the terms of years for which the leasehold premises were holden, and were entitled to carry on the iron works for the benefit of the family of their testator, in the same manner as he carried on the same with *Crawshay*, and according to the directions of *Hall*'s will, until one of his sons should attain the age of twenty-one years, and that the joint interest which the plaintiff *Crawshay* and the testator *Hall* had in the leasehold premises and iron works, was not an interest in an ordinary trading partnership, but was an interest given by the testator *Richard Crawshay* to them respectively, and for the benefit of themselves and their families respectively, commensurate with the terms of years for which the said leasehold premises were holden; and that therefore no sale of the said property ought to be directed by the Court, in opposition to the bequest of *Richard Crawshay*, and to the will of *Hall*, whose family would in that event be deprived of the benefits intended and contemplated by him to be derived to them from the leasehold premises and iron works.

The bill in the second cause was filed by the executors of *Hall*, and his widow and children, against the plaintiff in the first cause, praying a declaration that the executors of *Hall* were entitled to the leasehold premises and iron works for three-eighth parts thereof, as tenants in common with *W. Crawshay*, who was entitled to five-eighth parts, until one of the sons of the testator *Hall* should attain the age of twenty-one years, and to carry on the iron works with *Crawshay*, for the benefit of the family of *Hall*, in the same manner.

manner as the testator carried on the same with him, and according to the directions of the testator *Hall's* will, until one of his sons should attain the age of twenty-one years, and that then such son of *Hall*, if he should so chuse, would be entitled to carry on the said iron works, for three-eighth parts thereof, as tenants in common with *Crawshay* accordingly; the bill also prayed various accounts and directions consequential on that declaration. *Crawshay*, by his answer to this bill, insisted on the determination of the partnership by the death of *Hall*.

It appeared that a posthumous son of Mr. *Hall* was born after both the bills were filed, and he was not made a party to either of the suits.

A motion was now made on the part of Mr. *Crawshay*, the plaintiff in the first and the defendant in the second cause, that it might be referred to a Master to consider and approve of a proper place for the sale and disposal of the whole of the co-partnership iron works, property, estate, and effects, of the said *W. Crawshay*, and *B. Hall*, deceased, in the pleadings mentioned, including the good-will of the joint trade, and that the Master might proceed to a sale thereof accordingly.

Sir Samuel Romilly, Mr. Bell, Mr. Horne, and Mr. Rigby, in support of the motion. No particular time having been agreed on for the continuance of the partnership between *Crawshay* and *Hall*, it was determined by the death of the latter, and is now to be continued only for the purpose of winding up the partnership concerns. This is a business of great importance in point of value, and Mr. *Crawshay* is not bound to continue it for the benefit of other persons who will be entitled to partake of the profits, but whose liability to the losses is at least doubtful. The order we seek may properly be made on motion, for by delaying it till the hearing, the Court will be compelling the surviving partner to carry on the business, and to continue a partner for a very

1818.  
  
 CRAWSHAY  
 v.  
 MAULE.  
 MAULE  
 v.  
 CRAWSHAY.

considerable time, possibly for the remainder of his life, with persons who are to participate in the profits, but are not to be answerable for the losses: And the following cases were referred to; *Crawshay v. Collins* (a), *Waters v. Taylor* (b), *Forman v. Homfray* (c), and *Featherstonhaugh v. Fenwick* (d).

Sir *Arthur Piggott*, Mr. *Hart*, and Mr. *Winthrop*, opposed the motion, contending that this could not be done by an interlocutory order, the effect being to anticipate a decree, and dispose of the whole question in the cause: that there was a want of parties, the children of the testator *Hall* not being parties to the first suit, and though the notice of motion was entitled in both causes, yet the order could not be in the second cause, which was instituted for totally different purposes; that a posthumous son of the testator *Hall* had been born since both the bills were filed, and ought to be made a party, as should the widow of *Hall*, she being a joint residuary devisee with her husband, under the will of *Crawshay*, and having now taken the whole interest by survivorship: that this was not the case of an ordinary trading partnership, but of a joint ownership in real estate, and in getting and manufacturing the produce, which was only a mode of enjoyment; that it was a mere tenancy in common, and that each party having the power of disposing of his share, and of compelling a partition, the Court had no jurisdiction to interfere by directing a sale; and that according to the true construction of the will and codicil of the testator *Crawshay*, his son, together with *Hall* and *Bailey*, or their representatives, were to carry on this business jointly during the continuance of the leases under which the property was held.

Sir *Samuel Romilly* in reply. If there be any foundation for the objection that Mrs. *Hall* is not a party, the suit by

(a) 15 Ves. 218. (b) 15 Ves. 10. (c) 2 Ves. & B. 329. (d) 17 Ves. 296.

the executors is entirely nugatory, and they are total strangers to the property, for if Mr. and Mrs. *Hall* were joint-tenants, she took the whole by survivorship, and there was nothing on which his will could operate. But in truth Mrs. *Hall* has no interest. The testator undoubtedly gave the general residue of his estate to Mr. and Mrs. *Hall* by his will, but by his codicil he declared, that the partnership should stand thus, *W. Crawshaw* three-eighths, *B. Hall* three-eighths, and *Joseph Bailey* three-eighths. The codicil does not name Mrs. *Hall*; and the effect of it is to take three-eighths of this property out of the operation of the residuary disposition made by the will, and to give them to Mr. *Hall* solely. Neither are the children necessary parties, for there is no immediate bequest to them, but merely a contingent bequest in favour of such son as may attain the age of twenty-one. The executors are the only necessary parties; if, however, there be any weight in the objection, the Court would afford an opportunity of amending the bill. But the principal question is, whether this is or is not a partnership. It appears that the business carried on at these mines is of such a description as would render the parties liable to the bankrupt laws, for it consists not only in getting the ore out of their own property, but purchasing ore from other persons. It is contended, that this is merely an interest in land, and that the parties would be entitled to a partition; but the testator *Crawshaw* constantly describes it as a partnership, and as a trade; the legacy to *Bailey* is to enable him to become a partner with his executor in one-fourth share of his trade. He does not give it as an interest in leasehold property, but as a trade, part of the capital of which consists of leasehold property. By the words "so long as the lease endures," he intended merely to give the interest he had in the leases, and not to render it imperative on the parties to continue partners for a term commensurate with their duration; besides there are several leases expiring at different times. It is unreasonable to suppose that the testator could mean

1818.  
CRAWSHAW  
v.  
MAULE.  
MAULE  
v.  
CRAWSHAW.



1818.  
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 CRAWSHAY  
 v.  
 MAULE.  
 MAULE  
 v.  
 CRAWSHAY.

that all who should become his representatives, or the representatives of any of his three devisees, should become partners; for then any creditor who might take out letters of administration would be entitled. And according to this construction, if one partner had become bankrupt, his assignees would be partners, and might sell his interest, and thus appoint a new partner in his place. It is quite in conformity with the practice of the Court to make an order on motion in such a case as this; for the Court does not permit one person to go on trading with that which belongs to another, especially where there are infants interested in the fund, but interferes, by interlocutory order, for the preservation of the property.

*The LORD CHANCELLOR* observed during the argument, that it would be very material to know whether this was a trading concern in which the partners could be made bankrupt, or a mere interest in land; that as to a joint interest in land, the Court would not interfere to put an end to the partnership, for each party might sell his share, but that as to a share in a trading concern, it was otherwise. And at the close of the argument, his Lordship made the following observations:—The motion is for a sale of the property, and in whatever terms it might be put, the Court, if it directs a sale, will take care to give directions to the Master in such way that it may be brought to sale in the most beneficial manner for all who are interested. Where a bill is brought to have a dissolution of partnership, and where it is quite clear on the bill and answer, that one or all of the parties have a right to consider it as dissolved, it is not contrary to the practice of the Court to direct a sale on motion, for the parties would be entitled to it if the cause stood for hearing on bill and answer. And notwithstanding there may be a right to insist that the partnership is at an end, yet it must continue for the purpose of winding up the concerns; but if at an end in point of law, by death, notice, or other mode of determination,

determination, neither party can make any other use of the partnership property, than an use consistent with the winding up of the affairs; and if, instead of winding up the concern, the party is acting as if the concern was going on, the Court will not permit him so to act, but will appoint a manager of the property for the purpose of winding it up, and direct in what manner he shall act for the benefit of all persons interested. The objection of form which has been made in this case, could, if well founded, be disposed of by directing the motion to stand over until the proper persons are made parties; and the motion may be considered in the same manner as if the infants were parties, and an application were made on their part, calling on the Court not to consider this as a dissolution of the partnership.

The general rules respecting partnership are well settled. *Where persons enter into partnership, and no term is limited for its duration, the partnership may be put an end to at a moment's notice by either party, and the partnership is then dissolved to this intent, that this Court will direct the party to continue its existence only for winding up the concern, and to act as if it continued for that purpose alone. So the death of a partner also occasions a dissolution of the partnership, and the Court will deal with it accordingly. There may undoubtedly be cases, in which, though no written contract provides for the duration of the partnership, there may be an implied contract as to the term of its duration; but I am yet to learn, that in a partnership concern, the purchase of leasehold estates of any given duration is a circumstance from which it is to be implied that the parties are to continue the partnership during that term. It might with equal reason be contended, that the parties by purchasing an estate in fee-simple were to continue partners for ever. It has been repeatedly decided, that if there is nothing more than a purchase of lands for the purpose of carrying on trade, the interests so purchased are neither more nor less than capital of the partnership trade, and disposed of accordingly;*

1818.  
CRAWSHAY  
v.  
MAULE.  
MAULE  
v.  
CRAWSHAY.

1818.  
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 CRAWSHAY  
 v.  
 MAULE.  
 MAULE  
 v.  
 CRAWSHAY.

cordingly; I remember a few years ago, there was much discussion of this subject in a case in the House of Lords.

That death should put an end to a partnership, or that it should be determined by notice, at a moment's warning, has been said in Courts of Justice to be an unreasonable doctrine. But it deserves much consideration before it can be so pronounced; for if the rule were otherwise, the effect would be, that partnership like marriage is to be entered into for better and for worse, for richer and for poorer, and whatever the fortune of the partnership may be, the parties must abide by it; but the rule as established is, that if they do not think proper to say by articles how long it shall endure, each party has an opportunity of dissolving the partnership, if circumstances should arise which may make it not only a prudent and necessary measure, but the only means of saving himself from ruin. And with respect to the death of a partner, when the consequences are considered of its not being a dissolution of the partnership, if whoever may happen to be the personal representative of the deceased partner were at all events to be introduced into the partnership, I doubt much whether if the law was to be laid down now, it would not be laid down in conformity with the rule which now exists. For if a contrary rule should prevail, is the surviving partner to take the chance of having for his partners one or several executors, an administrator either in the person of the next of kin of the deceased, or of one of his creditors? and not only an executor, but the representatives of a surviving executor, might have to come in each for a share in the partnership, and of course in the conduct of the concern. The chance of having all such persons as by intestacy or by will might be immediately introduced into a partnership upon the death of a partner, if the law were to be otherwise, is a risk which a prudent man would not like to incur. The doctrine therefore appears to me to be reasonable,

I agree

I agree that if *Mr. Crawshaw* the testator in this case, had by his will directed that his legatees should carry on this concern by themselves and representatives as long as the longest of these leases should endure, nobody claiming under the will could take the benefit of it, who would not submit to all the inconveniences which the testator had prescribed; but I can find no such thing in this will. It might perhaps be contended (but I think not effectually), that *Mr. Bailey* and *Mr. Hall* should continue in partnership as long as they lived; but to carry it further appears to me quite impossible; there is clearly nothing imperative on any other person. The difficulty with respect to the argument that the partnership is to continue as long as the longest lease should endure, is this; they cannot pretend that the partnership was to continue so long between the original partners and their representatives, for they have admitted, as they must admit, that each partner might not only have assigned his interest, but have assigned to any number of persons any number of shares derived out of his original share; so that this partnership, which was to endure for so long a period, might within two years after it was formed, be a partnership consisting of forty persons, of whom not one might possibly be either an original partner, or the representative of an original partner.

There is another way of considering this case. It would be difficult to make out that this is a mere interest in land, unconnected with some trading partnership—a mere interest in land in which partition might take place; for where parties purchase an interest in land, and bring to market the produce as one common fund to be sold for the benefit of all, it might be contended that they had entered into an agreement to make it referrible to the principles and doctrine of partnership.

This is the view which I take at present of the merits of the case, but I shall give the subject further consideration.

1818.  
CRAWSHAW  
v.  
MAULE.  
MAULE  
v.  
CRAWSHAW.

1818.  
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 CRAWSHAY  
 v.  
 MAULE.  
 MAULE  
 v.  
 CRAWSHAY.  
 June 27.

The LORD CHANCELLOR, after stating the terms of the motion, and the will of Mr. *Crawshay*, pronounced his judgment to the following effect:—The purpose for which the testator gives this 25,000*l.* to Mr. *Bailey* is to enable him by a capital to become a partner with his executor, and that executor is Mr. *Hall*; the rest of his interest in this concern, if he had not made a codicil, would have passed under the residuary clause to Mr. and Mrs. *Hall*. But he made a codicil, and the effect of the will and codicil, I apprehend to be this; that the testator having been himself possessed of the entirety of this concern, he by his will disposes to *Bailey* of two-eighths, and Mr. and Mrs. *Hall*, under the residuary clause, would have taken the three-eighths, afterwards given to Mr. *Crawshay*, but for the codicil; and the effect of the codicil is to give three-eighths to Mr. *W. Crawshay*, and three-eighths to Mr. *Hall*, excluding his wife from those three-eighths, and to continue the two-eighths to Mr. *Bailey*. That being the state in which the concern stood at the death of the testator, it appears that *Bailey* sold his two-eighths to Mr. *Crawshay*, and it has not been disputed in the course of the argument, that every one of these individuals was at liberty to sell his own share; the consequence of which is, that the individuals who formed the partnership might be changed as often as parties who are concerned as partners are disposed to quit the concern, and to admit others in their places; and the question upon these pleadings is, whether, supposing this was heard as a cause, the Court would order this property to be sold, or whether the nature of the interest which these individuals have in it is such that each person is at liberty to sell his own share, but not to call on the Court by an interlocutory order to sell the whole. Mr. *Crawshay* had bought the interest of Mr. *Bailey*, and it appears that Mr. *Hall* and Mr. *Crawshay*, until the death of Mr. *Hall*, carried on the business jointly. Mr. *Hall* by his will gave to his executors the discretion of carrying on this concern, as far as he was interested

interested according to their view of it, in that way which was most beneficial for his family; but it appears that he thought himself at liberty (for the will states as much) to introduce three executors as partners with Mr. *Crawshay* as trustees for the various branches of this family as *cestui que* trusts, and it cannot be said that they can continue partners with Mr. *Crawshay*, without admitting the propriety and justice of that reasoning that will contend that if Mr. *Hall* can impose on Mr. *Crawshay* the necessity of continuing in partnership with his three executors, and their *cestui que* trusts, that he might also have imposed on Mr. *Crawshay* the necessity of receiving as a partner any person who may now or at any future time sustain the character of executor or administrator, however that character may be acquired. It appears to me, considering the principle that governs partnerships, impossible to say that Mr. *Crawshay* stands in that situation. Upon the death of Mr. *Hall*, as there were no articles of partnership, I apprehend that without any notice whatever, the partnership would cease, except for the purpose of winding up the concern, unless the surviving partner and those who represented the dead partner, entered into some agreement that the partnership should continue. I apprehend also, that on the principle of common partnerships, where there are no written articles, nor any time appointed for the continuance of the partnership, either Mr. *Crawshay* or Mr. *Hall* might have put an end to the partnership. It is contended, that in the first place it is obvious that the late Mr. *Crawshay* had got together this concern, and that he was anxious to keep it together as one concern, although he has divided the interest in it among the different branches of his family; and no doubt if he had in his will declared such an intention, those who took his bounty must have taken it on the terms which he prescribed; but taking the effect of the will and of the codicil together, the intention appears to have been, that they should become interested in this concern in certain aliquot proportions.

1818.  
CRAWSHAY  
v.  
MAULE.  
MAULE  
v.  
CRAWSHAY,

1818.  
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 CRAWSHAY  
 v.  
 MAULE.  
 MAULE  
 v.  
 CRAWSHAY.

tion. The will indeed declares that *Bailey* should have an interest of 25,000*l.*, and that he should be a partner with the testator's executor, but there is nothing to shew that he meant to impose either on *Bailey* or on the executor an obligation to carry on the partnership, except as between themselves, and if the executor thought proper to allow *Bailey* to sell to *Crawshay* his interest, a question might possibly have arisen so long as that executor was living, whether *Crawshay*, purchasing the interest of *Bailey*, would not be subject to the condition that this will imposes on *Bailey*; but the moment that executor was dead, it became impossible to say that either Mr. *Crawshay* or Mr. *Bailey* would have been compellable to carry on this business with the executors of that executor. I could not hold that, unless I was prepared to say that he must carry it on not only with the executor of that executor, but with all the successive executors of the surviving executor as long as these leases shall continue. It is also argued that the purchase of the leases is evidence of a contract to continue the concern. I do not say that there may not be cases of a party purchasing a lease in which there may not be evidence of an intention to carry on the partnership as long as the lease endures, but as a general doctrine, it is quite impossible to say that because parties are interested in a leasehold estate, they thereby become contractors to continue together in partnership as long as the lease shall endure. The lease is only part of the capital stock of the concern, and may be sold; nor would the purchase of a freehold estate make any difference on this point, where it is considered as part of the stock of the concern, though there have been cases where on a purchase of freehold by a partnership, questions have arisen whether it was in case of death to be considered as real estate, or as so much of the capital and stock in trade. I am therefore of opinion in this case, that it is impossible to say that this is to be a partnership for the duration of the leases, or of the longest of the leases which belonged to the partnership.

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From the will of *Mr. Hall* it appears that the question whether the partnership should continue is left to the discretion of the trustees; that is evidence that *Mr. Hall* thought that his interest could be separated from *Mr. Crawshaw's*, and if so, *Mr. Crawshaw's* interest may be separated from *Mr. Hall's*, and those who argue on that intention must argue that he wished the concern to be kept together, though it was perfectly indifferent to him what person should be the owner; an intention not to be imputed to him unless it is to be found in the very words he has adopted.

The question then resolves itself into this; What is the nature of this property? Now the general doctrine with respect to a trading partnership is, that where there is no agreement for its duration, any partner may put an end to it when he pleases, and although much inconvenience may attend that doctrine, much would also attend a contrary rule, and it is very questionable whether a better rule could now be settled; but the law being settled, it is for those who enter into partnership to guard themselves against inconveniences by entering into express stipulations on the subject. But although this is the case in trading partnerships, yet in pure landed property it does not appear that this doctrine applies, because parties become tenants in common, and one tenant in common cannot call on his companion to join with him in the alienation of the property, but each may sell and dispose of his own share as he thinks proper. It is said that this is no more than the case of persons who are tenants in common of a mine, and if so, I think that the doctrine applicable to land will apply to them, and not the doctrine of trading partnership; but whether, if being originally tenants in common of a mine, they also become jointly interested in the manufacture of the minerals, until they become marketable articles for purchase in the way of trade, they are still to be considered as tenants in common of a mine, it is difficult to say; and it is more difficult to say that they are to be considered merely as jointly interested in a mine,

1818.  
CRAWSHAW  
v.  
MAULE.  
MAULE  
v.  
CRAWSHAW.



1818.  
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 CRAWSHAY  
 v.  
 MAULE.  
 MAULE  
 v.  
 CRAWSHAY.

mine, if they are not only procuring and ameliorating the produce of their own mines, and carrying it to market, but also purchasing the produce of other mines, and manufacturing it together with their own; and it might be a question in bankruptcy, whether they were purchasing the produce of others for manufacture with intent only the better to bring the produce of their own mines to perfection, or that they were purchasing for the purpose of bringing a distinct subject to market as traders. This question is, on the evidence before me, left somewhat doubtful; the expressions of *Mr. Hall* in his will, and of all the instruments before me, consider this as a trading concern, but I think it would be proper to have this explained by affidavit. If it is a partnership concern, then the principle of a common partnership applies.

Another question is, whether the Court can in such a case direct a sale upon motion. I have given this point much consideration, and I think, if it be clear that this is a trading concern, and that it is dissolved, the Court has the power, which it has in many instances exercised, of ordering the property to be sold. The consequences might be very inconvenient, if, when the Court has before it a trading partnership clearly dissolved, and all that remains for the Court to do is to wind up the concern, it should nevertheless suffer it to be carried on until a decree for sale shall be pronounced, whatever may be the injury it involves, whether the trade can be beneficially carried on or not, and notwithstanding it is clear that such a decree for sale must ultimately be made. If that were the rule, the jurisdiction would be extremely mischievous. It is of great importance (and it is conformable both to the principles and the practice of the Court) that the partnership should be put an end to when it is clearly a dissolved partnership. I must necessarily postpone the order till I see the affidavit which I have mentioned.

In consequence of the Lord Chancellor's suggestion, an affidavit was afterwards made by Mr. *Crawshay*, stating that the iron works in question had, from the period of their first establishment by his late father, been conducted as a trading concern; that the produce of the mines consisted of iron-stone, coal, and lime-stone, and that at the works large quantities of iron of different sorts, enumerated in the affidavit, had been and were manufactured, sometimes from the materials obtained from the premises held under the leases mentioned in the pleadings, and sometimes from pig iron and finers' metal purchased from neighbouring works, and old wrought iron from ordnance and naval stores purchased in *London, Plymouth, and Bristol*, in large quantities: that from the first establishment of the works to the present period, the proprietors had been in the habit of making considerable purchases of iron ore, pig iron, finers' metal, old wrought iron, naval and ordnance stores, for the purpose of manufacturing the same at the works into various sorts of iron, and reselling the same in that manufactured state: that such purchases (to a large amount), manufacture, and resale, had been made by the respective firms of *Crawshay, Hall, and Bailey, and Crawshay and Hall*, at the works, during the continuance of those respective partnerships, the whole of which purchases, and of all the purchases of pig iron and finers' metal, old wrought iron, naval and ordnance stores, made by the respective firms, were so made with a view to a profit by manufacturing the same at the works into bar and other iron for resale, and not merely for mixing the same with the iron the produce of the works, for the purpose of improving the iron of the works, or bringing the same better to market: that from the first establishment of the works, the iron-stone, coal, and lime-stone, produced from the mines on the works, had never been sold in their natural or raw state, except a small quantity of coals for the accommodation of the labourers.

1818.  
CRAWSHAY  
v.  
MAULE.  
MAULE  
v.  
CRAWSHAY.

1818.

CRAWSHAY

v.

MAULE.

MAULE

v.

CRAWSHAY.

July 23, 31.

The case was several times mentioned again with reference more particularly to the objection that *Mrs. Hall* was not a party, and to the questions whether the proper course was to appoint a manager, or to direct a sale, and whether there should not be some previous reference to the Master to enquire which would be the most for the benefit of the infants.

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July 22.

*The LORD CHANCELLOR.* This is one of the most important motions I have had before me for a considerable time. It is made in both the causes, to neither of which is the widow of *Hall* a party. One party considers the partnership dissolved by *Hall's* death, and the other, that it still continues with *Crawshay*. I think it clear that *Crawshay* would have the same right to dispose of his interest as *Hall* had to bequeath his. I am quite satisfied the executors cannot tie *Crawshay* to them; it is another question, whether he can compel them to dispose of the concern. There is no equity to compel them to remain in partnership, except by some express or implied contract, or by directions in the will under which they both claim. I cannot however find any such directions. It is enough to say, that even if the will had imposed any condition, yet when *Bailey* and *Crawshay's* interests became united in one person, and when the executor was dead, having made such a will as that which appears on these pleadings, it is impossible to say that any condition remained which imposed on these parties an obligation to remain partners during the continuance of the leases. If it was a partnership in trade, the utmost extent is, that it should be inferred that the partnership was to continue as long as the leases should last, but I do not think there is any thing from which it can be so inferred; for a lease purchased by a partnership is only part of the stock in trade. The next question is respecting the absence of *Mrs. Hall*. When the nature of the property disposed of by the residuary clause is considered, and that her husband had considerable

considerable powers over her interest, it would be difficult without further enquiry, to know where the property now is. That *Hall* had no notion that his wife had an interest, is clear, for he disposed of it by his will, and probably gave interests to her, which possibly by election might come round to the same thing. This makes it material to consider that she is not a party, and that the infant is not a party. On the other hand, it is impossible to call on *Crawshay* to be a partner if he does not chuse. It is impossible to say he is bound to unite himself with the other parties, whether they are considered as the persons having the legal estates, or as trustees, or that he has not the same right which *Hall* supposed himself to have when he made his will. And this brings it round to the question, whether it was a partnership or a tenancy in common in real estate, and whether the Court is to wait till a decree before it disposes of the property. I take the general principle to be, that the Court is not to wait till a decree, if there is a clear partnership in trade, but at any rate if the parties differ, they are entitled to have a manager. Whether they will move for that, or put it to the Court to decide whether there is to be a sale without such motion, is what I wish the parties to determine. Mr. *Crawshay* says very properly he will not take the management, if ~~three-eighths~~ are to be for the benefit of *Mr. Hall's* representatives. I however desire it to be understood that I do not decide against ordering a sale, if I have *Mrs. Hall* and the infant before the Court. If Mr. *Crawshay* will not carry on the concern, it is for the interest of all parties that a manager should be appointed: I cannot prevent Mr. *Crawshay* from stopping the works.

1818.  
CRAWSHAY  
v.  
MAULE.  
MAULE  
v.  
CRAWSHAY.

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*The LORD CHANCELLOR.* The first question is, whether *Mrs. Hall* has any interest. Now how does that stand in the opinion of other persons? First, her husband disposed of the whole; his executors have filed a bill on the supposition

July 31.

1818.  
 CRAWSHAY  
 v.  
 MAULE.  
 MAULE  
 v.  
 CRAWSHAY.

tion that she was not interested: and lastly, the codicil I think is a revocation as to the trading concern. The point for the Court to consider therefore is, whether it is clear that the partnership is dissolved by the death of *Hall*, or whether his executors are now partners in the concern. After much consideration, I have no doubt that if it was a trading concern, the partnership was at an end by his death; and I have no doubt that it was a trading concern. If so, *Crawshay* is justified in dealing with it, from *Hall's* death, as a person may do who is to wind up the concern. If I leave *Crawshay* in possession to deal as one partner may where there is a dissolved partnership, he may deal with it for the purpose of winding it up. It is true the others may also deal with it in the same manner, and if they do not agree, the only thing is for the Court to appoint a manager. If a manager was applied for, the only course would be to have a reference to enquire whether it is more for the benefit of the infants to have a manager or a sale. I cannot see that I should be taking an improper course, if I refer it to the Master of the Vacation to enquire whether it will be for the benefit of all concerned, that the works should be sold, or be carried on for the purpose of winding up the concern, without prejudice to any question on the coming in of the report.

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The Order, as settled by the Lord Chancellor, referred it to the Master of the Vacation to enquire, and state whether it would be for the benefit of all parties concerned in the works, that the same should be sold, and in what manner, as going works, or that they should be carried on for the purpose merely of winding up the concern; the parties to be examined on interrogatories, if the Master should think fit, and to produce all books, papers, &c. relating to the works, the production of which the Master should think proper to require, and that he should proceed *de die in diem*.

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The Master, by his report, dated the 11th of *December* 1818, after stating that the said *W. Crawshay* had proposed before him to become the purchaser of the whole of the interest of the executors of *Hall*, in the works and premises, for the sum of 90,000*l.*; and the executors having testified their consent thereto, certified, that he had considered and did approve thereof, and that he was of opinion that it would be for the benefit of the infants, and of all other parties concerned in the iron works, that the whole of the shares and interest in the iron works, leasehold and other estates, utensils, stock in trade, profits, and premises vested in *Maule*, *Llewellyn*, and *Kaye*, as executors of *Hall*, should be sold to the said *W. Crawshay* in the manner aforesaid, and at the said price of 90,000*l.*

By an order of the Vice-Chancellor, made on the 24th of *December* 1818, on the petition of *Mr. Crawshay*, the Master's report was confirmed; and it was ordered that the defendants *Maule*, *Llewellyn*, and *Kaye*, as executors of *B. Hall*, should be at liberty to sell to the petitioner by private contract at the sum of 90,000*l.*, ascertained and apportioned as in the report specified, all the estate, shares, right, and interest, of the said defendants, as such executors of and in the said iron works, and the said late co-partnership of *Crawshay* and *Hall*, and in the leases, lands, machinery, capital stock, profits, debts, property, and effects, specified in the Master's report.

1818.  
  
 CRAWSHAY  
 v.  
 MAULE.  
 MAULE  
 v.  
 CRAWSHAY.

ROLLS,  
June 12.

RAVEN v. WAITE.

A testator bequeathed a sum to trustees to place out at interest, and pay and apply the interest for and towards the maintenance and support of *F. R.*, and the maintenance, education, and bringing up of all and every her children, until the youngest should attain twenty-one, and then to pay the interest to the plaintiff during such part of her life as she should remain the wife of *J. R.* for her sole use, and after her death to *F. R.* whilst she should be his widow, and in case of her death or marriage, then to apply the interest towards the maintenance of her children till the youngest should attain twenty-one:

Held that *F. R.* was not entitled to the interest until the end of a year after the testator's death, although the testator (who was her husband's uncle) was in his life-time in the habit of allowing her an annuity for her support; the exception in favour of legacies by parents or persons *in loco parentis* never having been extended to the case of an adult legatee, and the testator having in the bequests of annuities to other persons directed the first payments to be made within the first year after his death.

**I**N February 1809 the plaintiff having been under the necessity of exhibiting articles of the peace against her husband *John Raven*, he soon afterwards executed a deed of separation, whereby property which had belonged to the plaintiff, and producing a small yearly income, was conveyed in trust for the separate use of the plaintiff, who agreed to take upon herself the maintenance of herself and of the six children she had by her husband. The parties continued to live apart from each other, and the husband did not afterwards contribute towards the maintenance either of the plaintiff or of her children. The plaintiff being unable to support herself and her children, *Josiah North* her husband's uncle assisted her by advancing several sums of money at the time of the separation and afterwards; and about the 1st of November 1809 he fixed his voluntary allowance to her at the sum of 60*l.* a year, which he regularly paid to her quarterly till his death (which happened on the 5th of November 1815) except the last quarterly payment, which having become due a few days before his death was soon afterwards paid by his executors.

*Josiah North*, by his will, dated the 2d of April 1810, gave to the defendants the sum of 1600*l.*, upon trust to place the same out at interest on government or real security, and with the interest and proceeds therefrom, from time to time, as the same should become due, pay and apply the same for and towards the maintenance and support of the plaintiff, and the maintenance, education, and bringing up of all and

every,

every her children, until the youngest of them should attain his or her age of twenty-one years; and from and after the youngest child should have attained to his or her age of twenty-one years, then to pay the interest of the 1600*l.* unto the plaintiff for and during such part of her natural life as she should remain the wife of the said *John Raven*, for her sole and separate use, and that he should not intermeddle therewith, neither should the same be subject to his debts, controul, or engagements:—And in case of the death of the said *John Raven*, then he directed his trustees to pay the said interest unto the plaintiff during such part of her natural life as she should continue his widow; but in case she should die during the life-time of her said husband, or in case of his death before she should intermarry with any other person, then the testator willed and directed that the said trustees, and the survivor of them, his executors, &c. should take the said children under their care and management, (as it was his express will that the said *John Raven* should not receive any benefit arising from the said sum of 1600*l.*), and apply the interest of the said sum of 1600*l.* towards the maintenance, education, and bringing up of all and every the said children, until the youngest of them should attain to his or her age of twenty-one years, when he directed that the said principal sum of 1600*l.*, and the interest then due thereon, in case the plaintiff should be then dead, or married again, should sink into the residuum of his personal estate, for the benefit of the several persons entitled thereto. The testator also gave some annuities to other persons, payable quarterly; and directed the first payment of the annuities to be made at the first quarterly day of payment after his death.

The bill, filed by *Frances Raven* by her next friend, against the executors of *North*, prayed the payment to the plaintiff of the interest of the 1600*l.* from the time of the testator's death.

1818.  
  
 RAVEN  
 v.  
 WAITE.



1818.  
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 RAVEN  
 v.  
 WAITE.

Mr. Ball and Mr. Barber for the plaintiff, contended that the general rule that a legacy does not bear interest till the end of a year after the testator's death did not apply to this case, which they argued fell within the exception established in favour of legacies given by a parent or a person in *loco parentis*: that the testator in this case had placed himself in *loco parentis* as to the plaintiff and her children, having from the time of the plaintiff's separation from her husband allowed her an annuity for the support of herself and her children, and having expressly given the interest of this legacy for the maintenance and support of the plaintiff, and the maintenance, education, and bringing up of her children. It is given for the benefit of the plaintiff and her children jointly; and even supposing the plaintiff herself would not be entitled, yet if she were dead the children would be entitled. The circumstance of their having a mother living cannot vary the case. The testator has directed that in the event of the plaintiff's death or marriage, the trustees shall take her children under their care and management, and apply the interest for their support. It is also a material circumstance in this case, that when the children attain the age of twenty-one, the 1600*l.* is to fall into the residue, and the capital is not given to them at all. And the following cases were cited, *Acherley v. Vernon* (a), *Beckford v. Tobin* (b), *Crickett v. Dolby* (c), (in the latter of which cases Lord *Alvanley* appears to have been of opinion that the exception is not confined to legacies to infants, but that a wife would come under the same exception as a child), *Tyrrell v. Tyrrell* (d), and *Hill v. Hill* (e).

Mr. Fonblanque and Mr. Blenman for the defendants. The plaintiff stands in the situation of a mere stranger to the testator. The exception in favour of legacies by persona in

(a) 1 P. Wms. 783.

(b) 1 Ves. 508.

(c) 3 Ves. 16.

(d) 4 Ves. 1.

(e) 3 Ves. & Bea. 123.

*loco parentis* cannot apply to every case where the legacy is given for the maintenance of the legatee. In order to ascertain whether the party was in *loco parentis*, the Court will look either at the intention as expressed by the will, or at the peculiar circumstances in which the parties stood; and will also take into consideration whether any necessity exists of providing maintenance, from which necessity the Court may draw an inference of an intention to give interest. That seems to have been the principle on which Lord Hardwicke proceeded in *Beckford v. Tobin*. In the present case the will furnishes no ground in favour of an intention to give interest before the usual period; on the contrary, where the testator gives annuities, and means an immediate benefit, he makes an express direction on the subject; from which circumstance it may be argued that he would have done so with regard to the provision he has given to the plaintiff, if such had been his intention. Nor does any necessity exist here for providing maintenance. There had been articles of separation between the plaintiff and her husband, by virtue whereof she had a separate maintenance, taking on herself the support of the children. But this case may be considered in another point of view, which is decisive against the plaintiff. This legacy is a benefit to an adult. As she had taken on herself the maintenance of the children, the testator by giving this maintenance was giving a benefit to the plaintiff herself, she being already bound to maintain them; and by giving her this, he intended to enable her to maintain them. In a recent case (a) your Honour decided that interest which was given to a person for the maintenance of her children was a gift to herself, she not having any children. The case of *Lowndes v. Lowndes* (b) is an authority against the extension of the exception to the case of an adult. In that case the Court of Exchequer suffered the cause to stand over, in consequence of Lord Alvanley's opinion in *Crickett v. Dolby*,

1818.

RAVEN  
v.  
WAITE.

(a) *Hammond v. Neume*, ante, 9.

(b) 15 Ves. 301.

but

1818.

RAVEN  
v.  
WAITE.

but were afterwards unanimous in deciding against the claim of the wife.

*The MASTER of the ROLLS.* This is a new question; but my present impression is, that neither under the language of the will, on principle, nor on authority, is the plaintiff entitled to interest from the death of the testator. The plaintiff is an adult, and a married woman with a separate maintenance, though its amount is not mentioned. It was given to her on condition of her maintaining the children. It does not appear what is her situation in life, nor whether she has any means of acquiring property. In addition to her separate maintenance, the testator in his life-time was in the habit of allowing her 60*l.* a year. The question is whether he meant to give her the interest of the legacy immediately on his decease, or not until the expiration of a year afterwards. The general rule that a legacy does not carry interest till the expiration of a year after the testator's death is not disputed. The reason on which this rule is founded is that interest is only given for non-payment; and that a legacy is not payable till a year after the testator's death, if no time of payment is appointed by the will. But to this general rule there are exceptions. One exception is the case of specific legacies, where a specific fund and its produce are given. There is however no pretence for arguing the present case on that ground, for this is clearly not specific. Another exception is the case of legacies for the maintenance of infants, and that forms the main point in the present case. The reasons for which this exception was introduced are, that a parent is under a moral obligation to provide for his child; that the child is in a destitute state, and is from its imbecility unable to give a discharge for the principal, if it was paid immediately; the Court therefore postpones the payment of the legacy, and infers an intention to give interest immediately. Is there then any thing to carry the exception further? All the cases cited are cases of infants, In the  
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very elaborate judgment of Lord *Alvanley* in *Crickett v. Dolby*, his Lordship, who was very guarded in laying down rules, expresses himself thus:—"The rule is that no interest is to be paid till the time arrives at which payment is ordered, except in one case only, that of a child."—"In that instance the Court does not postpone the payment of interest till a year after the death of the parent; for the Court considers the parent to be under an obligation to provide not only a future but a present maintenance for his child, and therefore holds, that he could have postponed the time of payment only from the incapacity of the child to receive, but that he never meant to deprive him of the fruit of the legacy; which fruit is the only maintenance, and which maintenance he was bound to provide. But what occasion is there for all this contention in favour of the child, if every one is entitled (a)?" And in *Beckford v. Tobin*, Lord *Hardwicke* proceeds on the same ground, the reasoning in both cases being expressly confined to the infancy of the legatee. *Hill v. Hill* was also the case of an infant, and was determined on the authority of *Beckford v. Tobin*, from which Sir *W. Grant* thought it could not be distinguished. In *Lowndes v. Lowndes* the Court of Exchequer held that the infancy of the legatees was not alone sufficient to bring the case within the exception. So far as the child was concerned, I do not see the distinction between that case and *Beckford v. Tobin*. The interest was directed to be paid during the life of *William Hook* into his proper hands for his support and maintenance; the words which follow were only meant as an additional guard to prevent alienation, and not to do away the object and purpose of the testator, which was to give maintenance to the legatee. The Court of Exchequer however in that case held that they could not extend the exception to the case of a natural child. But all the experience and learning of the bar have not been able to

1818.

RAVEN  
v.  
WAITE.

(a) 3 Ves. 131

furnish

1818.

W  
 RAVEN  
 v.  
 WAITE.

furnish me with a case in which the exception has been extended to a legacy in favour of an adult. There must have been many instances in which legacies have been bequeathed by testators to aged or decrepid persons, who have been objects of their bounty in their lives. By deciding in favour of the present claim I should be letting in a new rule in favour of all persons who have received a benefit from a testator in his life-time. Where are we to stop? for it is argued that it is of no importance what may be the fortune of the legatee. The consequence would be, that there is some charm in the words "support and maintenance," which is in all cases to have the effect of carrying interest to the legatee from the death of the testator. In the case of an infant legatee those words may have had such an effect; but never in the case of an adult. The only instance in which it has been thought that the exception could be extended to an adult is *Crickett v. Dolby*, in which Lord *Alvanley* intimated an opinion that a wife would come under the same exception as a child. Much respect is certainly due even to a dictum of that great Judge. But his Lordship considerably weakens the force of his observation by adding that he could not find that exception in the books, and that it can hardly ever happen that a wife has not some other provision; intimating also that the circumstance of there being another provision may make a difference even in the case of a child. Opposed to the dictum of Lord *Alvanley*, thus qualified, is the direct decision on the point by the Court of Exchequer in *Lowndes v. Lowndes*; a decision which was unanimous, and which was pronounced after having been suspended from a deference to the dictum of Lord *Alvanley*, and for the purpose of maturely considering it. The extension of the exception to an adult, is therefore negatived by the latest, and indeed the only decision on the subject. The present case is the case not merely of an adult, but of an adult with an actual provision from the person who is bound to support her, and who may be in a state of affluence; circumstances, which

which according to the only dictum which is to be found, are admitted to make a difference. As to the language of the will, the testator shews by the bequests of the annuities that he knew how to give an immediate provision when he intended it. He might by a single word have made a similar provision for the immediate benefit of the plaintiff, had such been his intention.

It is said that this is a joint provision for the plaintiff and her children. But there is no ground for holding it to be so. It is evidently given to the mother for her support and maintenance. It is for the maintenance of her children so far only as it augments her means of providing for them. On her decease it is to be received by the trustees. The testator must have known that she was under an obligation to maintain the children. The primary object of the testator's bounty was the plaintiff herself. This does not take it out of the general rule.

The only other argument is that if she had died in the testator's life-time, this would have been an immediate bequest in favour of the children. But the will must be construed according to its expressions, and as looking to the probability of the plaintiff's surviving the testator, and not to the consequences of subsequent events. Upon the whole, I dare not in the absence of authorities carry the exception further; but I must abide by the rule which I find established.

Bill dismissed.

1818.

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RAVEN

r.

WAITE.

ROLLS,  
June 1, 8, 11.

# HOOPER v. GOODWIN.

*A.* died intestate, entitled to personal estate, part consisting of bank annuities in a trustee's name, the dividends whereof were payable to *B.* the intestate's widow for life. Administration was granted to *B.*

*C.*, one of the next of kin, by letter addressed to *B.* after mentioning the intestate's property, expressed himself thus; "my share I shall relinquish to you for your benefit only." A deed of release and assignment from *C.* to *B.* of all *C.*'s interest in *A.*'s effects, was afterwards by *C.*'s direction prepared for his execution, but never executed; *C.* having died the day before that on which he had directed his solicitor and a witness to attend him to attest the execution of the release; but having joined with *B.* and the other next of kin of *A.* in executing a release to the trustee of the bank annuities on the trustee's transferring them to *B.* :—

On a bill by *C.*'s executors against *B.* for an account and payment of *B.*'s distributive share, it was decreed as to the general personal estate; but refused as to the bank annuities and their produce.

**T**HIS was a bill filed by the surviving executors of *Henry Goodwin*, the brother and one of the next of kin of *Robert Goodwin*, who died intestate, against the widow and administratrix of the latter, for an account, and payment of *Henry Goodwin*'s distributive share. The claim was resisted by the defendant under the following circumstances. *Robert Goodwin* the intestate died without issue, on the 12th December 1808, and his personal estate became divisible as follows : one-half to the defendant his widow ; one-fourth to his brother *Henry Goodwin* ; and the remaining fourth to his nephews and nieces *Thomas*, *John*, and *Mary Ann Kington*, and *Susan Bayly*, who were the children of a deceased sister of the intestate. On the 20th December 1808, *Henry Goodwin* addressed to the defendant a letter in which after regretting that his brother had not made a will, he expressed himself as follows: "In regard to his property, I cannot think that the law will give the *Kingtons* any thing; let that be how it may, my share I shall relinquish to you for your benefit only." *Henry Goodwin*'s fourth share of the intestate's property, consisted of upwards of 1100*l.* in cash, in the defendant's hands, and a fourth part of 907*3l.* 14*s.* 6*d.* three per cent. annuities, standing in the name of *Francis Morgan*, the dividends whereof were payable to the defendant during her life, by the will of *Henry Mugleworth*, but the capital of which, subject to her life interest, formed part of the effects of the intestate. On the 14th March 1809, the defendant's solicitor by her request, and in consequence of the letter of the 20th of December 1808, sent to the testator *Henry Goodwin*, for his signature, a printed discharge

for his share of the intestate's property, in the form prescribed by the acts imposing the duties on legacies, &c. (a), by which the testator was made to acknowledge the receipt of a balance of 2600*l.* and upwards, as the amount of his distributive share after deducting the duty. This printed discharge, the testator, on the 21st of *March* 1809, sent to his own solicitor, requesting to be informed whether it would be proper that he should acknowledge the receipt of the money, as it would not be according to the fact. To this the testator's solicitor answered that a release would be better, as it would state the testator's renunciation of all claims upon the property of his late brother, and would explain the motives on which he acted. Accordingly in the beginning of *June* 1809, the testator's niece by his direction, instructed his solicitor to prepare a deed of release, which he had promised to execute in favour of the defendant, for the purpose of his relinquishing or giving to the defendant, his share of his deceased brother's property. The draft of a release was accordingly prepared by the testator's solicitor, sent by him to the testator for his perusal, and having been approved of by him, was by his direction returned to his solicitor, by whom it was at the testator's request copied on stamped paper, and got ready for his execution. The instrument thus prepared was a deed poll, whereby after reciting that by the decease of his late brother *Robert Goodwin*, intestate, the testator was entitled to one-fourth part or share, or some other distributive share of his personal property; and having no wish to advantage himself by any unintentional omission of his said brother, and in consideration of 5*s.* paid to him by the defendant, the testator *H. Goodwin* thereby released the defendant, and the estate of his said brother from the payment of all or any sums or sum of money, and also from the transfer of any property or effects which might have legally accrued to him by the aforesaid event; and did moreover assign and transfer all such money and property unto the de-

1818.  
  
 HOOPER  
 &  
 GOODWIN.

(a) 36 G. 3. c. 52. 44 G. 3. c. 98. 45 G. 3. c. 28.

fendant,



1818.  
 ~~~~~  
 HOOPER  
 v.  
 GOODWIN.

defendant, her executors, administrators, and assigns, as *her* and their goods and chattels, from thenceforth for ever. The testator frequently from the beginning of *June*, to the day of his death, expressed an anxious desire to execute the instrument which had been prepared, and requested his solicitor to attend him for that purpose; but its execution was at some times prevented by the illness of the testator, (who from the month of *March*, had been in a state of great debility), and at others by the absence of the solicitor, and of the apothecary who attended the testator, and who was recommended to him as a proper person to attest the execution; the testator repeatedly saying that he wished very much to get the business of the relinquishment settled, and that he would settle it at any time when the solicitor and the apothecary would attend him. The 24th of *June* 1809 was at length appointed for that purpose; about eight or nine in the morning of the 23d, the testator mentioned the circumstance of the solicitor and intended witness having appointed to be with him on the morrow, and expressed a hope that he should be able to receive them, and sign the release to Mrs. *Goodwin*, as he much wished it done: but on the same 23d of *June* the testator died without having executed it.

With regard to the three *per cent.* annuities, it appeared that in *March* 1809, the testator executed an indenture dated the 1st of that month, between the defendant of the first part, the testator *Henry Goodwin, Thomas, John, and Mary Ann Kington, and Susan Bayly*, described as the only next of kin of *Robert Goodwin*, living at his death, of the second part; and *Francis Morgan* of the third part; whereby after reciting the will of *Mugleworth*, the purchase of the stock, and the death of *R. Goodwin* intestate, and that inasmuch as the defendant was under *Mugleworth's* will intitled to the dividends of the stock during her life, she had with the privity and consent of *Henry Goodwin, Thomas Kington, John Kington, Mary Ann Kington, and Susan Bayly*, as being the next of kin of *Robert Goodwin*, testified by their executing the indenture,

indenture, applied to and requested *Morgan* to immediately yield up and transfer the stock unto the defendant, which *Morgan* had agreed to do, upon receiving such release and indemnity as after mentioned; and that he had accordingly with the consent and approbation of *H. Goodwin*, the *Kingtons*, and *Susan Bayly*, executed a letter of attorney, authorising a transfer of the stock to the defendant: It is witnessed that in consideration of the premises, and especially of *Morgan* having executed the power of attorney, the defendant, and also the testator *Henry Goodwin*, and the other next of kin, according to their several rights, interests, and capacities aforesaid, and in all and every other right, interest, and capacity whatsoever, did release, acquit, and discharge *Morgan*, his heirs, executors, &c. and also the heirs, executors, &c. of his deceased co-trustees, of and from the sum bequeathed by *Mugleworth's* will to *Morgan*, and his co-trustees, upon the trusts therein expressed, and also from the stock purchased therewith, and every part thereof, and from all the interest, dividends, and profits thereof, to the date of the indenture, and from all actions, suits, claims, and demands at law, and in equity, which the defendant and the testator *Henry Goodwin*, and the other next of kin, or any of them then had, or which they or any of their executors, &c. at any time or times thereafter could or might have challenge or demand against *Morgan*, his heirs, executors, &c. or his or their goods or chattels, lands or tenements, or the heirs, &c. of his late co-trustees, by reason of the legacy, and the stock purchased therewith, or the interest and dividends thereof, or any matter, cause, &c. concerning the same; and the releasing parties jointly and severally covenanted with *Morgan*, to indemnify him, his executors, &c. against all actions, suits, &c. by reason of his transferring the stock to the defendant. It having been agreed between the defendant and *Thomas, John*, and *Mary Ann Kington*, and *Susan Bayly*, that the defendant should enjoy the interest of their shares during her life, she entered into a bond to them, conditioned

1818.

HOOPER  
v.  
GOODWIN.

1818.  
  
 HOOPER  
 v.  
 GOODWIN.

conditioned to be void if the heirs, executors, &c. of the defendant, should within three months after her decease transfer to them their executors or administrators, a sum in the three *per cents.* equal to their share of the stock transferred to the defendant by *Morgan*; but no such arrangement was entered into between her and *Henry Goodwin*.

The defendant by her answer insisted that the declaration contained in the letter of the 20th *December* 1808, amounted to an actual release and extinguishment of his share of the intestate's effects; and that by reason of the property and effects to which the testator was entitled, being in the hands of the defendant herself, and not of any third person, the letter was a sufficient authority for the defendant retaining such share to her own use, without any formal release for that purpose.

*Mr. Bell* and *Mr. Girdlestone*, for the plaintiffs, contended, that in order to discharge the defendant from her liability to account, words of actual and express release were necessary; that however apparent it might be that the testator would have executed a release, yet that not having actually done so, his representatives were entitled to the account; that the act was incomplete, and that it was clear from the letter, and the rest of the evidence, that a further act was contemplated. In *Cotteen v. Missing (a)*, your Honour held that there was not a perfect gift, under circumstances as strongly shewing an intention to give, as those which appear in the present case. ..

*Mr. Hart* and *Mr. Wingfield* for the defendant. The Court will not assist the plaintiffs in recovering from the defendant a share of her husband's personal estate which it was clearly their testator's intention not to take from her. No deed of release is necessary if the intention sufficiently ap-

(a) 1 *Madd.* 174.

pears. If indeed the defendant was requiring the assistance of the Court, the case might be different; for the Court would perhaps refuse to interpose in behalf of one who claims as a volunteer; but the defendant seeks no relief, for she is herself in possession. With regard to the testator's interest in the stock standing in the name of *Morgan*, the case is much stronger; for the testator has actually joined with the other next of kin in a formal release to *Morgan*, the trustee of the stock, on his transferring it to the defendant.

1818.  
HOOPER  
v.  
GOODWIN.

Mr. *Bell* in reply, observed, that as no action at law can be maintained for a legacy or a distributive share of an intestate's effects, this was not a suit depending on any equitable principle; but a legal mode of enforcing a demand, and to which nothing short of a strict legal defence could be a sufficient answer. That with regard to the release executed to *Morgan*, it did not purport to be a discharge to the defendant. It might be made in consequence of a doubt whether the trustee would be justified in transferring the stock to her without the concurrence of the next of kin. The stock or its produce having become vested in her *quâd* administratrix, she must hold it for the benefit of the next of kin. *Ripley v. Waterworth (a)*.

June 8.

*The MASTER of the ROLLS.* This is a bill by the representatives of *Henry Goodwin*, claiming the portion which was due to their testator, of the personal estate of his late brother *Robert Goodwin*. It is not disputed that they are entitled, unless the testator by some act in his life-time renounced his right to an account; but it is insisted that by the documents produced, and the acts proved to have been done by the testator in his life-time, his representatives are precluded from claiming. The evidence principally relied on by the defendant, is the testator's letter of the 20th December 1808, in which he expresses an intention to relinquish

June 11.

(a) 7 Ves. 425.

his

1818.  
  
 HOOPER  
 v.  
 GOODWIN.

his share to the defendant for her benefit only. He lived till the 23d of the following *June*, when the event of his death happening sooner than was anticipated, prevented the intention he had thus expressed, from being carried into effect by the execution of a formal instrument of release. It appears that a solicitor was employed, and that a release would have been completed except for an objection made respecting the printed form of a discharge; a release being considered a more proper instrument. A release was accordingly prepared and intended to have been executed; but its execution was prevented by the absence of the solicitor, and the illness of the testator; but up to the very day of his death he expressed his wish that the release should be executed. The Court would undoubtedly go as far as possible to execute such a purpose. The demand is not brought forward till after a considerable lapse of time; the testator having died in 1809, and the present bill not being filed till 1817; but the executors being merely trustees, have felt that their duty towards their cestui que trusts required them to call on the defendant if she is by law responsible. And notwithstanding the inclination I feel to assist the defendant, I do not think she can effectually resist the demand so far as it relates to the general personal estate. In order to constitute a valid gift either at law or in equity, the act must be complete. If the subject be capable of delivery, a delivery is absolutely necessary. I do not now advert to such gifts as fall within the description of a *donatio causâ mortis*; but to gifts *inter vivos*. It is not enough that an intention to give should be expressed; the gift must be actually executed. If the subject be a *chose in action*, there must be some act amounting to a parting with the property. Without going into the authorities, which are all collected in *Cotteen v. Missing (a)*, it is sufficient to say that in the present case there was not a complete act. A further act was intended, but never actually completed. It was an inchoate gift, but not such a gift as

(a) 1 Madd. 176.

could

could be pleaded in a court of law, or insisted on as a bar to the demand.

The other part of the case however is on a different footing. The intestate was entitled to certain bank annuities, part of the property of *Henry Mugleworth*, the annual dividends of which were payable to the intestate and his wife and the survivor for life, and afterwards the capital was to go to the representatives of the intestate. When he died, the defendant was entitled to a life interest in this stock, which was then standing in the name of *Morgan*, as a trustee for the parties interested. That the defendant as administratrix of her husband was not entitled absolutely to this stock, is admitted; but the testator *Henry Goodwin*, having by the deed of the 1st of *March* 1809, which has been produced, released the share to which he was entitled in this stock, the question is, whether on this part of the case enough has not been done to effectuate the intention expressed by his letter, of relinquishing his interest in favour of the defendant, and whether this instrument was not executed for the purpose of carrying into effect that intention, and will not operate to transfer the testator's interest in this fund to the defendant. It is true that it is a release not to the defendant, but to *Morgan*, the trustee of the fund. The legal interest in the fund was in *Morgan*; and the equitable interest in reversion was in the defendant as administratrix. The testator had previously declared by his letter that he meant to relinquish his share in favour of the defendant, including his share of this fund as well as of the rest of her late husband's property. All the parties to the deed concur in releasing *Morgan*, provided he transfers the stock to the defendant. It is not said that it is to be transferred to her as administratrix, or that she is to account either to *Henry Goodwin* the testator, or to any other persons; but all the parties interested join in an absolute release. It appears that the other next of kin took a bond from the defendant for securing their shares; but the testator did not call for any

1818.  
  
*HOOPER*  
*v.*  
*GOODWIN.*

1818.

HOOPER  
v.  
GOODWIN.

such bond. His release consequently operated as an absolute release so as to give up all his interest. In *Ex parte Dubost* (a), a letter was written by the testator to *Dubost*, who resided in *Paris*, authorizing him to purchase an annuity there for the benefit of another person for life, and to draw on the testator for 1500*l.* on account of such purchase. *Dubost* purchased the annuity, but the person for whose benefit it was intended being then a married woman, and deranged, the annuity was purchased in the name of the testator. Afterwards the testator sent to *Dubost* at his desire, a power of attorney, authorising him to transfer the annuity to the person for whose benefit it was intended, and who was then a widow, and had recovered from her derangement. The testator died, and *Dubost* not knowing that fact, acted on the power of attorney, and transferred the annuity accordingly after the testator's death. The Lord Chancellor was of opinion that though in one sense the annuity might be represented as the testator's personal estate, yet he had committed to writing what seemed a sufficient declaration that he held that part of the estate in trust for the annuitant. In that case though the testator had himself done no act to transfer the property, and the power of attorney fell to the ground, it was yet held sufficient to shew his intention to declare himself a trustee. The present question is attended with some doubt; but I think it will not be straining the effect of the release too far, to say that it was pursuant to and intended for carrying into execution the purpose expressed in the letter, and to prevent the testator from calling on the defendant for an account. To the extent therefore of the testator's share of the produce of the stock, I think the defendant is protected; but as to the rest of the intestate's estate, she must be decreed to account.

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(a) 18 Ves. 140.

Mr. Bell and Mr. Girdlestone for the plaintiffs, on this day made an application to the Court to vary the minutes, by inserting a declaration that the defendant was to be charged with interest on the balance in her hands, arising from the general residue of the intestate's estate; insisting that a trustee retaining trust money or using it for his own benefit, was always charged with interest.

1818.  
  
 HOOPER  
 v.  
 GOODWIN.  
 1819,  
 February 8.

Mr. Hart and Mr. Wingfield, contra.

*The MASTER of the ROLLS.* Nothing was said about interest when the decree was pronounced, nor is there any thing in the prayer of the bill, to shew that the plaintiffs meant to call for interest. It must be admitted that a demand of a balance is not of necessity a demand of interest. Should not a case then be made out to fix the defendant with the payment of interest? If it is to be paid, should it not be from the intestate's death? See how the case stands. It is admitted that it was in consequence of the testator's intention remaining unexecuted, that the capital of this fund was prevented from going to the defendant absolutely. The letter clearly expressed the testator's intention. He was so convinced that he had no claim, that he actually released the stock; and though he executed no actual release as to the other part of the property, yet he never called for it, intending it to remain for the defendant's benefit; and can his executors now say that notwithstanding this, there has been a wilful detention on the part of the defendant, and under such circumstances as shall compel her to pay interest? This is a consequence which would not follow even if the claim of the plaintiffs had been made immediately. The Court will not fix her with interest when the detention was with the permission of the testator. For some years the claim does not appear to have been thought of. It is not a case of a personal representative wilfully misapplying the fund contrary to the trusts of the will. It is not the negligence of an administratrix who



1818.

HOOPER  
v.  
GOOLWIN.

is called on to account and refuses, but it is the case of an administratrix who retains the fund with the acquiescence of the party entitled. I am of opinion that under the circumstances of this case the defendant ought not to be charged with interest.

April 24.

GERARD v. PENSWICK.

In a suit by a principal against his agent, the latter was ordered on motion to produce books of account in his possession, relating to the plaintiff's affairs, sealing up such parts as did not concern the plaintiff, and pledging himself by affidavit to seal up those parts alone.

SIR Samuel Romilly moved on behalf of the plaintiff, that the defendant might produce and leave with his clerk in court certain books of account admitted by his answer to be in his possession. The defendant was the agent and steward of the plaintiff, and the bill was for an account of his transactions in that character.

Mr. *Solicitor-General* and Mr. *Girdlestone* opposed the motion, on the ground that the defendant was willing to permit an inspection of the books at his own house, which was within a short distance from that of the plaintiff; that the books did not exclusively relate to the plaintiff's affairs, but contained copies of bills of exchange, and letters and entries of various transactions of the defendant on his private account; and that some of the books were in daily use.

Sir Samuel Romilly and Mr. Horne in support of the motion, contended that there was no evidence that the books were in daily use; that although in cases between merchant and merchant, on account of the inconvenience of removing books, the Court might suffer the inspection to be at the house of the party in whose possession they are, the same rule did not apply to questions between principal and agent; that it was the defendant's duty as agent to keep his own affairs distinct from those of his principal, and could not by mixing them prevent the plaintiff from compelling the production of the books.

*The*

*The LORD CHANCELLOR.* If there is no affidavit that the books are in daily use, the proper order is, that the defendant shall produce and leave them with his clerk in court, sealing up those parts which do not relate to the plaintiff, and pledging himself by affidavit not to seal up any thing that does relate to the plaintiff.

1818.  
GERARD  
PENSWICK.

WILSON v. GREENWOOD.

**B**Y indenture dated the 20th of October 1812, *William Ellis*, and the defendants *Greenwood* and *Whitaker*, covenanted with each other, that they would be partners in the trade of cotton spinners, in certain premises therein mentioned, from the 30th of June then last, for the term of four years next ensuing, determinable nevertheless as after mentioned; but if the partnership should not be dissolved by the death of any of the parties, or for such misconduct as afterwards mentioned, and if none of the partners should give twelve calendar months previous notice in writing to the others, of his intention to put an end to the co-partnership at the expiration of the term of four years, then the co-partnership should not cease and determine at the end of that term, but be continued until one of the partners being desirous of putting an end to the co-partnership, should give twelve calendar months previous notice in writing of his intention to dissolve it; and thereupon the co-partnership should at the expiration of the twelve calendar months notice, as to the partner giving such notice, cease and determine.

April 16. 18.  
July 17.

By deed of partnership between A. B. and C. it was provided, that in case of a dissolution of the partnership by the death, or certain acts of misconduct of any partner, or by notice, the other partners should have the option of taking his share at a valuation, to be paid by yearly instalments, the last of which was not to be payable till seven years after the dissolution; and that in case of the bankruptcy or insolvency of a partner, the partnership

should be dissolved, the property sold, and the produce divided among the parties, according to their proportions. The partners four years afterwards, by another deed, recited and declared it to have been their intention in the former deed, that the same mode of arranging the partnership concerns, should take place in case of the bankruptcy or insolvency of a partner, as in the cases of dissolution by death, notice, or misconduct. B. became bankrupt four months after the last deed was executed:—Held, that on B.'s bankruptcy, the partnership effects were to be disposed of in the same manner as if the second deed had not been made.

*Scamblé*, such a provision, even if it had been in the first deed, would have been void, as against the policy of our bankrupt laws.

The

1818.  
WILSON  
v.  
GREENWOOD.

The deed contained a provision that immediately after the determination of the partnership, either by the death of the partners or by such notice, or for any misconduct (as mentioned in another clause of the deed), a final account should be made up of the co-partnership, and the property belonging thereto; and all the debts which should be then owing by or on account of the partnership, and the excess of capital which any partner or his executors might then have in the partnership, over and above the share of the other partners, or their executors, should be discharged out of the partnership effects; and that all the mills and real estate, and also all the goods, chattels, and effects of the co-partnership, should be fairly valued by three indifferent persons, one to be named by each of the said partners, or by the executors or administrators of a deceased partner, as the case might be; and in case any of the partners by whom such nomination should be required to be made, should refuse to join in such nomination, then the three referees to be all named by the other or others of the said partners interested in the valuation; and which referees or any two of them should have full power, in order that they might form a better judgment, to employ, at the expence of the co-partnership estate, competent persons, to estimate the value of the respective properties; and the judgment and determination of the said referees should be final and conclusive as to the value; and upon such valuation being perfected, the surviving or continuing partners should have the option of purchasing or refusing to purchase the share of the partner so dying or quitting the partnership, at the price ascertained by such valuation, and should be allowed two months time from the date of the valuation for making such election; and in case of any difference in judgment between the referees chosen by the partners, the referees, or any two of them, should appoint some indifferent person as umpire, whose judgment should be final and conclusive, and should be performed and fulfilled by the said partners, their respective executors and administrators, in the same manner

manner as if made by the referees; and the determination of the referees, or any two of them, should bind the said several partners, their respective executors and administrators, to complete and perfect the sale and purchase of the share of every such partner so dying or withdrawing from the partnership, by making and accepting a due and regular release and assignment thereof, at the price so fixed and ascertained; but that such partners or partner continuing to carry on the trade, and becoming the purchasers or purchaser of the share and interest of the partner and partners dying or withdrawing from the partnership, should be allowed the term of seven years for the payment of the price or purchase money to be given for the share or shares of the partner or partners dying or withdrawing from the partnership as aforesaid, the same to be paid by equal instalments in every year, together with interest for the purchase money, or the unpaid part thereof, from the determination of such partnership until payment of the instalments; and the purchase money and interest should be well and effectually secured by a mortgage of the share and interest so sold, and such bond or further assurance as by such retiring partner or the executors of such deceased partner should be lawfully and reasonably required; and that in such bond or other assurance, should be inserted a condition or proviso, whereby, if default should be made in payment of any of the instalments for the space of one calendar month next after the same ought to be paid, the whole of the said instalments and purchase money should become an immediate debt, and might be sued for, raised, and levied, and execution taken out thereupon, as if the whole had been reserved or made payable at the time appointed for payment of the first instalment: Provided always, that if the partners or partner continuing to carry on the trade, should refuse or neglect for two months next after the date of the valuation, to declare their or his intention of becoming the purchaser of the share or interest of the partner so dying, withdrawing from, or quitting the partnership, at such price or valuation, then

1818.  
  
 WILSON  
 v.  
 GREENWOOD,

1818.  
WILSON  
v.  
GREENWOOD.

then it was declared, that the parties would within two months next after such refusal or neglect, concur in a sale of the entirety of the partnership property by public auction. It was further declared, that the parties were joint and equal partners, as well in the said mills and other property as in all profits of the trade, and that they also should equally bear all the losses.

The deed contained a further provision, that if any of the said partners should become bankrupt or insolvent, the said partnership, with respect to such partner, should be thereupon immediately void; and also that upon the ceasing and total dissolution of the said partnership, a general and final account in writing should be taken and entered in the co-partnership books, of the property belonging to or employed in the trade, and of all debts and engagements due or owing from, or entered into by the partnership, and true copies of such account should be delivered to each of the parties, or their respective heirs, executors, or administrators, and that the same and the copies thereof should be signed by all the partners, testifying their settling and approving thereof; and that thereupon the co-partnership estate and effects should be sold and converted into money, and after payment of the debts and engagements due from and entered into by the co-partnership, the balance and residue of the co-partnership estate and effects should be divided between and paid to the parties in equal third parts, according to their respective shares and interests in the co-partnership; but if the monies arising from the sale of the co-partnership estate and effects should not be sufficient to satisfy the debts and engagements of the co-partnership, then the said partners should pay such deficiency equally amongst them, according to their respective shares and interests in the co-partnership.

The co-partnership business was carried on till the 9th of *November* 1816, when a joint commission of bankrupt issued against *Ellis*, and certain persons with whom he was in partnership in another concern distinct from that which formed the subject

subject of the deed of the 20th of *October* 1812; and the plaintiffs were the assignees of *Ellis* under that commission.

1818.  
WILSON  
v.  
GREENWOOD.

The bill was filed against *Greenwood* and *Whitaker*, the solvent partners, charging that the co-partnership between *Ellis*, *Greenwood*, and *Whitaker*, had become dissolved by the bankruptcy of *Ellis*; and it prayed a declaration to that effect, and that the plaintiffs, as the assignees of *Ellis*, were entitled to have all the partnership property, as well real as personal, sold; the bill also prayed a sale, an account of all the partnership property and effects, that the outstanding debts might be collected, the liquidation of all the partnership accounts, as well between the defendants and the bankrupt's estate, as between the co-partnership and all other persons; and that the clear surplus of the co-partnership property and of its proceeds, and of the profits of the concern down to the date of the commission might be ascertained; that the share coming due to the bankrupt's estate, might be paid to the plaintiffs, and that if the defendants had since the commission carried on the trade or used the co-partnership property for their own benefit, they might be compelled to account for one-third part of the profits, or interest upon the bankrupt's share, from the date of the commission, at the option of the plaintiffs; and a receiver.

A motion was made on behalf of the plaintiffs, before answer, and on affidavits of the circumstances above stated, for a receiver and manager of the partnership property, with powers to get in the debts, and to sell and convert the remaining stock in trade into money, and pay the proceeds into Court.

It appeared by affidavits filed in opposition to the motion, that an indenture dated the 3d of *July* 1816, was executed between *Greenwood* of the first part, *Whitaker* of the second part, and *Ellis* of the third part; whereby, after reciting the former indenture, and that the parties conceived they had not thereby (although their original intention

was

1818.  
WILSON  
v.  
GREENWOOD.

was so to do), in the case of bankruptcy or insolvency of any one of the said parties, or in those cases followed by notice, amounting to a dissolution of the co-partnership, sufficiently provided for the circumstance of any two solvent partners, or any two partners desirous to continue as between themselves the said co-partnership, carrying on the same on the terms and conditions annexed to the two cases of a partner dying, and the case of a partner withdrawing himself voluntarily from the co-partnership; and that the parties being desirous to place every case of a dissolution of their said partnership, which should apply to or arise upon the going out voluntarily or involuntarily of any one of the said partners, on the same footing, should the same happen by death, under a notice of withdrawing, *from bankruptcy*, insolvency, or for any other reason mentioned in the articles of partnership as causes of dissolution, had agreed to execute the present instrument to give effect to their intentions: It is witnessed, that in consideration of the premises, and for carrying into effect the agreement and meaning of the parties, they did thereby covenant with each other, that in all cases of a partial dissolution of the said co-partnership, wherein one only of the parties should withdraw from or leave the co-partnership concern, or cease to have any interest therein, whether the same should happen with or without his consent in any manner, the same order and method, and none other should be adopted and preserved, for ascertaining his interest and property in the said partnership effects, as was laid down and marked out in the original articles of partnership in the two cases of a partner dying, or of his withdrawing under his own notice for that purpose: and that the same period of time, to wit, seven years from the time of such dissolution, by seven equal yearly instalments, bearing interest, should be allowed to the continuing partner, for the liquidation of the retiring partner's share and interest in the partnership property as it might then happen to be, any thing in the recited articles contained to the contrary notwithstanding: And the parties


parties did thereby in all other respects not thereby altered, changed, or varied, ratify and confirm all the clauses, provisions, and agreements, contained on their parts in the original articles of partnership.

1816.  
  
 WILSON  
 v.  
 GREENWOOD.

It was stated in the affidavits filed in support of the motion, that at the time when this latter deed was executed, the other partnership in which *Ellis* was engaged as before mentioned, was in embarrassed circumstances; it also appeared by the affidavits in support of the motion, but was denied by those of the defendants, and of *Ellis* himself, that *Ellis* was then insolvent, to the knowledge of the defendants. On the 13th of the same month, *Ellis* stopped payment, and on the 9th of November following, a joint commission issued against him and his partners in the other partnership in which he was engaged, under which they were declared bankrupt, *Ellis* in his examination before the commissioners did not make any mention of the deed of the 3d of July 1816. The defendants gave notice to the plaintiffs, that they did not insist on that part of the clause in the second deed, which allows seven years for payment of the valuation; but that on the valuation being made, they were ready to pay the amount immediately.

Sir *Samuel Romilly*, Mr. *Bell*, and Mr. *Horne*, in support of the motion. The stipulation that in case of the bankruptcy of one of the partners, his share shall be taken at a valuation, was not contained in the original deed of partnership, but in a subsequent one executed long afterwards and at a time when the bankruptcy of *Ellis* was extremely probable. It was therefore clearly void, as being evidently in contemplation of bankruptcy. It is not therefore necessary in this case for your Lordship to determine whether such a clause would have been valid, if it had been contained in the original instrument. The second deed proceeds on an untrue statement, that the former deed contained no provision for the event of bankruptcy; but the first deed, after providing



1818.  
  
 WILSON  
 v.  
 GREENWOOD.

providing modes of settling the partnership accounts in case of a dissolution occasioned by certain acts of misconduct by the partners, proceeds to put the case of bankruptcy on a different footing. It makes no provision for the appointment of a valuer by the assignees of a bankrupt partner; the valuers are to be appointed by the partners, "their executors or administrators," clearly shewing that the clause relative to valuation, was not meant to apply to a dissolution by bankruptcy. Seven years are to be allowed for payment of the price at which the share of the retiring partner should be valued; and it is to be secured by bond, and by a mortgage not of the whole of the property, but merely of the purchased share. The time allowed for payment is unreasonably long. Supposing it to be competent to persons on originally entering into trade, to make such an agreement as that which is contained in the second deed, it may nevertheless be questioned whether persons already bound by a contract of partnership, can afterwards say to the world, that when one of them becomes bankrupt, the others should have such terms as those which are in the present case provided by the second deed. But independent of all other objections to this provision, it would have been void if it had been inserted in the original articles. In that point of view it is a question of the utmost importance in bankruptcy; for if such a claim can succeed, your Lordship will seldom have to deal with a bankrupt's property in the ordinary way. The question is, whether persons already in trade can by a private agreement withdraw the partnership property from the operation of the bankrupt laws in the event of a commission issuing. It is impossible that such an agreement can be valid against creditors. A partnership is dissolved by bankruptcy; and the parties cannot stipulate with each other that on the bankruptcy of one, his property shall remain with the others on a credit of seven years, contrary to the policy of the bankrupt laws. He cannot stipulate that on bankruptcy his property shall not be distributed among his creditors. It is an agreement directly  
 contrary

1818.  
WILSON  
v.  
GREENWOOD.

contrary to the policy of the bankrupt laws. Can a person enter into a contract which is not to take place except on the happening of an event which will entirely disqualify him from contracting at all? According to *Domett v. Bedford* (a), a man may give property on what terms he pleases, when it is his own gift; but can the bankrupt himself agree that he shall enjoy his own property till his bankruptcy, and that it shall then be transferred to others on terms not consistent with the laws of bankruptcy? In the cases on marriage settlements, it has been held that the wife's property may be limited to the husband, subject to be defeated on his bankruptcy, but not the property of the husband himself, although in that case there is the consideration of marriage (b). An engagement of this kind cannot take effect, that when he is no longer liable to the contract, the property shall be applied differently.

*Mr. Hart and Mr. Shadwell, contra.* This is an application by the assignees of the bankrupt partner, to take from the solvent partners against whom there is no imputation of unfair dealing, not only the share of the bankrupt, but the shares of the defendants themselves. The question is not whether a trader can be allowed to subtract his share of the capital, for in the present case, the solvent partners are only desirous to prevent the trade from being broken up, and have intimated that they do not mean to avail themselves of that part of the clause in question which allows seven years for payment of the instalments. They merely desire a valuation according to the principle agreed on by the parties, whilst *Ellis* was solvent. It is insisted that an engagement of this kind by parties in trade, with a view to the protection of their own rights, is, divested of all other circumstances, against the policy of the bankrupt laws, and therefore void. If that question be ripe for decision, and if such a stipulation be

(a) 3 Ves. 149.

(b) On this point see *Ex parte Murphy*, 1 Sch. & Lefr. 44. *Ex*

*parte Meagher*, *Ib.* 179, and the cases there referred to.

1818.

WILSON

v.

GREENWOOD.

one which the law prohibits, there is undoubtedly an end of this question; and the only consideration will be, in what manner the property is to be disposed of for the benefit of the creditors. It must be admitted that the provision in question was not contained in the original articles: but the second instrument must be taken as a contract declaratory of the original intention, and as having been entered into for the purpose of superadding a provision originally intended, but not sufficiently specified in the first. This transaction is not in opposition to the policy of the bankrupt laws, for those laws leave a person at liberty to enter into contracts affecting his own property. It is true that the property of the bankrupt is to be distributed among the creditors: but what is meant by his property? It is the produce of his effects, subject to all anterior contracts he may have imposed on it. Nothing in the system of the bankrupt law prevents a man from tying up his property, or ruining it by speculations; why may he not impose on it those fair restrictions, the effect of which may be to protect others, but it being matter of uncertainty at the time of the contract, to which of the parties the restrictions may ultimately become beneficial? A person in trade may prevent his property from immediate perception and distribution. He may take a security from his debtor, payable in twenty years, and under some circumstances such an arrangement might be beneficial to the creditor. Still in the event of a bankruptcy it would be withheld from the assignees, and the creditors must bear it. They would have their election either to keep the dividend open, or to sell the debt as one payable at a future day. It might be contended that it is a fraud on the bankrupt laws for a trader to entangle his property with loans, and prevent a distribution. Where is this policy in favour of creditors to stop? In the course of commercial dealings many transactions are entered into which of necessity remain unsettled for a long series of years. If traders are about to open a mine, they advance an immense capital, which must be lost if the concern should be broken up  
and

and sold: it is not unreasonable that they should endeavour to guard against such an event, by agreeing that if either party should become bankrupt, the other should not be liable to have the whole speculation destroyed and broken up. The creditors can only take that residue of a bankrupt's property, which remains after the performance of all contracts entered into with fairness and honesty between the bankrupt and others. The way in which the contracts have been made, may not be so beneficial to his creditors as if they could have immediately called for payment, but more beneficial than other modes of disposing of it, which he was at liberty to adopt. There is nothing intrinsically against law in such a transaction as the present. If it be void against creditors under a commission of bankrupt, it may be argued that it would be equally void against executors. If *Ellis*, instead of becoming bankrupt, had died, his executors must have suffered his capital to remain in the partnership trade. But supposing he had left debts of greater amount than his share of the capital, ought not the transaction to be held to be as much a fraud on his creditors in that event as in the event of bankruptcy? The creditors of a trader who dies insolvent, are surely not less the objects of protection than the creditors of a trader who becomes bankrupt; and if such a rule is to prevail, no person in trade can bind his executors in this manner, unless he should leave assets aliunde. This can be no fraud unless it is made so by the statutes which direct the property to be immediately divided; and they mean his property subject to all antecedent contracts. It is however unnecessary in this case to argue the general question, for the assignees having permitted the defendants to remain in possession and to carry on the trade ever since the bankruptcy, cannot now require the interference of the Court in this summary way.

1818.  
  
 WILSON  
 v.  
 GREENWOOD.

*The LORD CHANCELLOR.* Where a partnership expires in consequence either of notice, death, or effluxion of time,  
 and

1818.

WILSON

v.

GARRAWOOD.

and I may add, of bankruptcy; and there is no special contract respecting the manner in which the property is to be disposed of, I apprehend in all those cases the partnership is to be considered as in one sense determined, and in another sense as continuing. It continues until the concerns are wound up; and as before the determination of the partnership, if any of the partners seek to exclude the others from taking that part in the concern which it belongs to a partner to take, and which it is the duty of the other partners to permit him to take, the Court will interpose and appoint a receiver; so it applies the same principle to the case of a partner carrying on after it is said to be terminated for other purposes, that partnership, which nevertheless continues in order to wind up the concerns.

The first question in this case is, whether this partnership is determined; and if it be determined, then whether there is or is not a special contract how the partners are to settle amongst themselves. The first question on that part of the case is, whether supposing the deed originally had provided for that distribution of the property in case of a dissolution by bankruptcy, which it has provided for in case of a dissolution operated by other causes, such an agreement would have been good. I will not say positively that it would not; but I will say this, that I have heard nothing to induce me to think it would. It is clear however on the original articles, that it was not in the contemplation of any of the parties, if their intention is to be judged of from what appears on those articles, that if a dissolution took place by bankruptcy, the distribution should be such as is now contended for by the defendants: for after providing for the distribution in other cases, it takes up the consideration of bankruptcy and insolvency, and it then expressly states, that in case of bankruptcy, the concerns of the partnership are to be wound up in the same manner as the concerns were to be settled where there was no special provision about it. Then another deed is made, which in one sense may be said to be in contemplation of bankruptcy, because it expressly provides what is to be done

done in case of bankruptcy. I have however no doubt that in the strict sense of the words that is a deed made in contemplation of bankruptcy; and I do not want any external evidence to satisfy me of that, because it is absolutely impossible for any Court of Justice to give credit to the recital in the second deed, when the contents of the first deed are examined. But I go further than that; because the inefficacy of the terms of the agreement when applied to bankruptcy is another proof. In case of misconduct the parties were to have the valuation made; each of the parties interested was to name a valuer; they were to name an umpire if necessary, and the property was to be divided; but in case any party died, and the dissolution of the partnership was operated by death, what was to be done then? The executors or administrators were to name a valuer. Then follows the provision for bankruptcy and insolvency, which are very different from each other. A provision for insolvency would do, because an insolvent person not being yet a bankrupt, retains a capacity of acting, so long as he has committed no act of bankruptcy; but if he becomes a bankrupt, it is impossible to say he is to be the individual who is to name a valuer to ascertain the interest of his assignees: and with respect to assignees naming a valuer, or having any thing to do with this species of distribution of the property, there is not a single word about assigns in either of the deeds. It is therefore clear to me, that however you take it, whether on the general principle, or on the effect of the instruments, and without looking at external circumstances, this partnership was dissolved by the bankruptcy, and that the effects must be distributed as in the ordinary case of bankruptcy without any special provision applying to it. The consequence will be that quoad the share of the bankrupt partner, his assignees became partners with the defendants the solvent partners, and have the same right with those partners; and the principle on which the Court must act, is that which applies to all cases where some partners seek to carry on the

1818.  
WILSON  
v.  
GREENWOOD.

1816.

WILSON  
v.

GREENWOOD.

“ and accounts, belonging to the co-partnership, and the de-  
 “ fendant *Greenwood* is to be at liberty to bring actions  
 “ with the approbation of the Master, as there shall be oc-  
 “ casion, for the recovery of such of the debts as are now due,  
 “ or shall hereafter become due, in the names of the parties or  
 “ any of them; and the persons in whose names such actions  
 “ shall be brought, are to be indemnified against the costs  
 “ and damages thereof, out of the stocks, goods, and effects  
 “ of the said co-partnership; the Master to settle the said  
 “ indemnity; and the defendant *Greenwood* to pay the ba-  
 “ lances which shall be reported due from him into the Bank  
 “ with the privity of the Accountant-General, to be there  
 “ placed to the credit of this cause, subject to the further  
 “ order of this Court. The parties to produce before the  
 “ Master all books, papers, and writings, and to be examined  
 “ on interrogatories as the Master shall direct. The Master  
 “ to make the parties all just allowances, and any of the  
 “ parties to be at liberty to apply to the Court as there shall  
 “ be occasion.”—[*Reg. Lib.* 1817, 7 B, fo. 1729.]

1818.



## SAVILLE v. The Earl of SCARBOROUGH.

 ROLLS,  
 March 11, 12.

**S**IR *George Savile*, Baronet, late of *Rufford*, in *Nottinghamshire*, by his will dated the 19th of *August* 1783, devised freehold estates in the Counties of *York* and *Nottingham*, and in the Bishoprick of *Durham*, to trustees, (subject to two terms of twenty-one years and five hundred years thereby created) to the use of the defendant, (by the description of his nephew the Honourable *Richard Lumley*, the second son of his sister *Barbara* Countess of *Scarborough*, by *Richard* late Earl of *Scarborough*) for his life; remainder to trustees to preserve contingent remainders; remainder to his first and other sons successively in tail male; remainder to the use of the plaintiff, then the Honourable *John Lumley*, for life; remainder to trustees to preserve contingent remainders; remainder to his first and other sons successively in tail male, with remainders over, and with the ultimate reversion to the testator's right heirs. The will contained a proviso, that if the title of Earl of *Scarborough* should descend to the defendant or the plaintiff, the estate which he or they should then be entitled unto in the hereditaments before devised under the testator's will should cease and become void; and the same hereditaments should immediately thereupon go to the person and persons who under the limitations aforesaid should then be next in remainder expectant on the decease and

A testator having devised estates to *A.* for life, with remainder to his first and other sons in tail, remainder to *B.* and his sons in the same manner, directed that his family pictures in his two mansion-houses should be considered as heir-looms, and should go and be held with his mansion-house by the person or persons for the time being in possession thereof by virtue of his will: he also gave the use of his prints and books of prints to *C.* for life, and after his decease he gave the same to *D.* And he gave to trustees all the household fur-

niture, glasses, china, books, statues, pictures, and other ornaments in his mansion-houses, (except family pictures and prints not framed), and his wines and provisions, carriages, horses, and implements of husbandry and gardening; for the following purposes, viz. to sell such parts as should be in his house at *L.* (except his family pictures) as they should think proper, and the other part which might be thought worth keeping to be removed to his house at *R.* and also to dispose of such part of his effects at *R.* as they should think proper, and to retain such part of his effects at *R.* as they should think proper; and after his debts and legacies should be reduced to 35,000*l.* then as to his family pictures, and such of his effects at *R.* as should remain unsold, in trust for *A.* in case he should be living, for his own proper use and benefit; but if he should die before that time without having any issue male living at his death, then in trust for any one of *B.* or the several other persons who should become entitled to the possession of his estates, for the same right and interest as before declared with regard to *A.* in case he should die without any issue male of his body, living at his death.

Held, that the family pictures were to go as heir-looms with the mansion-house; but that when the debts and legacies were reduced to 35,000*l.* *A.* became absolutely entitled to the furniture and other effects mentioned in the will.

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1818.  
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 SAVILE  
 v.  
 The Earl of  
 SCARBOROUGH,

failure of issue male of the person to whom the said title should so descend or come, in the same manner as such person or persons so in remainder would take the same by virtue of his will, in case he or they to whom the title of Earl of *Scarborough* should come and fall in possession as aforesaid, was or were actually dead without issue.

The testator also devised his leasehold mansion-house in *Leicester Fields*, in the county of *Middlesex*, to *John Hewett*, *John Michell*, and *Gilbert Michell*, in trust to pay the rents reserved and perform the covenants contained in the lease; and subject thereto, in trust for such persons, and for such estates, and subject to such limitations over as were before expressed concerning his freehold estates in the County of *Nottingham*, or as near thereto as might be, and the nature of the leasehold estate would admit of: To the end that the same leasehold premises might be enjoyed and go along with the said freehold premises as long as might be, and the rules of law and equity would permit.

The testator then directed that all his family pictures which at the time of his decease should be in his said mansion-houses at *Rufford* and *Leicester Fields*, or either of them, should be deemed and considered as heir-looms, and should descend and go and should be held and enjoyed with his said mansion-house, by the person or persons who for the time being should be in possession of, or entitled to the same mansion-house by virtue of that his will: and he gave the use of all his prints not framed, and books of prints, to Mr. *Peter Grandy*, during his life, and after his decease he gave the same to *Francis Ferrand Foljambe*. And he gave and bequeathed to the said *John Hewett*, *John Michell*, and *Gilbert Michell*, their executors and administrators, all the household goods, furniture, glasses, linen, plate, china, books, busts, statues, pictures, and other ornaments, which at the time of his decease should be in his said mansion-houses, or either of them (except the family pictures and prints not framed), and also all the stores of wines, and other  
liquors

liquors and provisions of house-keeping, that should at the time of his decease be in his said mansion-houses, or either of them, and all his carriages and horses, and all his implements and utensils of husbandry and gardening at *Rufford*, and all other his live and dead stock there, for the purposes following, that is to say; to sell and dispose of such part thereof as should be in his house in *Leicester Fields* (except his family pictures) as they should think proper; and the other part thereof as might be thought worth keeping, to be removed to his house at *Rufford*, and also to sell and dispose of such part of his live and dead stock and effects at *Rufford*, as they should think proper, and to retain and keep such part of his effects at *Rufford*, as they should think proper; and from and after the debts he should owe, and the legacies he should think fit to give by any codicil or codicils, should be reduced to 35,000*l.* then as to his said family pictures, and so much and such part of his effects at *Rufford*, as should remain unsold, in trust for his said nephew *Richard Lumley* (the defendant), in case he should be living, for his own proper use and benefit; but if his said nephew *Richard Lumley* should die before that time without having any issue male of his body lawfully begotten, living at the time of his decease or born in due time after, then in trust for any one of the plaintiff or the several other persons therein named, who should become entitled to the possession of his said estate in *Nottinghamshire*, at the expiration of the said term of twenty-one years, for such and the same right and interest as was or were thereinbefore mentioned and declared, with regard to his said nephew *Richard Lumley*, in case he should die without leaving any issue male of his body lawfully begotten, living at the time of his death; the elder of the younger sons of his said sister the Countess of *Scarborough*, being always preferred, and to take before the younger of them. The testator appointed *Hewett, Foljambe*, and the two *Michells*, executors; but *Foljambe* alone proved the will.

1818.  
  
**SAVILE**  
 v.  
 The Earl of  
 SCARBOROUGH.

The

1818.  
  
 SAVILE  
 v.  
 The Earl of  
 SCARBOROUGH.

The testator died soon after the date of his will, and the testator's debts and legacies being reduced to \$5,000*l.* the defendant was, under a decretal order of this Court, made on the 22d of *July* 1789, let into possession of the estates in *Nottinghamshire* and *Leicester Fields*; and by another decretal order made on the 18th of *March* 1793, he was in like manner let into possession of the rest of the estates.

On the 5th of *September* 1807, the late Earl of *Scarborough* died, whereupon the Earldom descended to the defendant; and the plaintiff having taken the surname and quartered the arms of *Savile* pursuant to a direction for that purpose contained in the will, became entitled to an estate for life in the *freehold* and *leasehold* property of the testator. It appeared that all the trusts of both the terms created by the will had been performed.

The bill, which was filed by the Honourable *John Lumley Savile*, against the Earl of *Scarborough*, stated that the testator at his death was possessed of certain family pictures in his mansion-houses at *Rufford* and *Leicester Fields*, and also of certain household furniture, glasses, plate, linen, china, books, busts, statues, pictures, and other ornaments; implements of husbandry and gardening, carriages, horses, live and dead stock, and other articles in his will mentioned, in his houses at *Rufford* and *Leicester Fields*, and also of certain fixtures in or attached to his houses, by his will devised, of very considerable value; and that soon after the testator's death his executors sold such part of these articles (except the family pictures), as was necessary for the purposes mentioned in the will, and kept the residue upon the trusts thereby declared, in pursuance of which they permitted the defendant to enjoy the same with the mansion-houses: that the defendant had caused to be removed from the house at *Rufford*, all or great part of the household furniture, glasses, plate, books, busts, statues, pictures, and other articles bequeathed to *Hewett* and *John* and *Gilbert Michell*, upon the trusts of the will; and prayed an account of all those articles  
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of which the defendant had had the use and enjoyment, and of what part had been lost or destroyed by him: that the plaintiff might be declared entitled to the use of such several bequeathed articles for his life, and that the defendant might be decreed to account for, or restore to the plaintiff such of the several bequeathed articles as should appear to have been at any time removed by him from the mansion-house at *Rufford*; or to have been lost or destroyed by him or applied to his own use.

The defendant by his answer claimed to be absolutely entitled under the will to all the articles in question, except five family pictures.

Mr. Bell and Mr. Pepsys for the plaintiff. No doubt can be reasonably entertained as to the family pictures which in the first clause are clearly given as *heir-looms*. The Court will not suffer any ambiguity in the subsequent clause to destroy the effect of the clear and intelligible language used in the first. The case of *Trafford v. Trafford* (a), very much resembles the present. In that case the first words were clear to give the articles in question to the party absolutely at the age of twenty-one; the latter words were inconsistent, directing that they were in the nature of *heir-looms* to go with the estate, but Lord Hardwicke held, that they were to be considered as *heir-looms*, observing, that the first clause would give the absolute property if it stopped there, but that the Court was not warranted to rest there, for the whole clause must be taken together so as that it might be entirely consistent. His Lordship added, that as to the last clause suppose that had been the single one, it would have been sufficient to make them go as *heir-looms*, and to wait the contingency; that the first words must be construed as a disposition only of the use, until some person who was entitled to the inheritance, should come into possession by attaining the age of twenty-one. That case is decisive as to

1818.  
SAVILE  
v.  
The Earl of  
SCARBOROUGH.

(a) 3 Atk. 347.

1818.  
  
 SAVILE  
 v.  
 The Earl of  
 SCARBO-  
 ROUGH.

the question respecting the family pictures, and cannot be distinguished from the present, except in a circumstance which is favourable to the plaintiff, namely, that there both the clauses were clear and intelligible, whereas here the clause which makes the pictures heir-looms is clear, and the other is unintelligible. The testator in *Trafford v. Trafford*, meant to mark the time at which the usufruct was to commence; here he meant to mark the time at which the articles in question were to be delivered to the defendant. As to the furniture and other property, they are disposed of by the same clause as the family pictures. If therefore the meaning be clear as to the pictures, the Court will not construe the same words differently with regard to the other articles. The testator gave a discretionary power to his trustees to dispose of these articles, many of which were perishable in their nature. The direction to the trustees to remove to *Rufford* such things as they should think worth keeping, is inconsistent with an intention that they should belong absolutely to the defendant. It would be an useless direction, for the defendant himself might immediately dispose of them. The true reason for this direction was that the testator had merely a term in the house in *Leicester Fields*, and he therefore meant these articles to be taken to *Rufford*, which he had strictly settled. To what end were they to be carried thither if they were to be the absolute property of the defendant who might immediately bring them back? The direction is therefore inconsistent with an absolute gift of them to the defendant, but perfectly consistent with their being heir-looms. The Court cannot stop at the end of the clause relative to the 35,000*l.* for the vesting would then be to depend on the act of the trustees. The debts might be discharged by other means than out of this property, and might depend on their discretion and arrangement. On that event happening the use of the articles was to commence: but it is contended for the defendant that an absolute interest in the defendant was then to take effect. The words however are to  
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be taken as descriptive merely of the time when the usufruct was to begin. If it was meant as an absolute gift it is extraordinary that the trustees should be directed to hold the property in trust for the defendant. The obvious mode would have been to direct them to deliver it over to him. The meaning was that they were to retain it for his benefit so long as he should be entitled to the enjoyment, but that he should not have the dominion over it. If the construction contended for on the other side be correct, the words will have a most extraordinary effect; for if the defendant had not performed the condition in the will, or had died without issue before the debts were paid, these articles would be undisposed of. The testator meant a benefit to the children of the tenants for life, but they do not take any benefit unless the Court adopts the construction that these articles are heir-looms, and then all persons taking under the limitations would be entitled to them in succession. The meaning of the clause taken altogether is that the articles should go to the sons of the Countess of Scarborough, in the same manner as the real estates had been previously limited to them, and the words "use and benefit" are to be understood as referring not to the absolute property, but to the usufruct or right of enjoyment.

Sir *Arthur Piggott* and Mr. *Heald* for the defendant, contended, that the defendant was the primary object of the testator's bounty: that when he made these specific bequests he had nothing in his mind about heir-looms, and that the value of the clear expressions in the will was not to be taken away by any obscure language occurring in subsequent passages. The construction contended for by the plaintiff is that the furniture and other articles remaining unsold are as much heir-looms as the family pictures; the clear intention however is, that if the defendant should come into possession, he should have those articles absolutely.

1818.  
  
 SAVILE  
 v.  
 The Earl of  
 SCARBOROUGH,

*The*

1818.  
  
 SAVILE  
 v.  
 The Earl of  
 SCARBOROUGH.

*The MASTER of the ROLLS.* I entertain no doubt on the construction of this will except as to the family pictures. I think that the household goods and other articles were not heir-looms. There is nothing to unite the clause which relates to them with the preceding clause which is expressly confined to family pictures. It sets out with distinguishing them, taking them out of the power of sale contained in the first clause, and describing them only as heir-looms. As the testator knew how to preserve personal property, when he has confined the description of heir-looms to his family pictures, it would be going a great way to extend the denomination to articles of any other description. The sentences which relate to the two descriptions of property are not the same; for there are intermediate dispositions to other persons, and having lost sight of the disposition he had previously made of the family pictures, he takes up the disposition of the other articles of personalty, many of which from their very nature he could not mean to be considered as heir-looms. He could not intend his carriages and horses, and his wines and other consumable articles to be comprehended under that description, nor could it be his intention to provide for the preservation of property of that kind as much as for that of his family pictures: if such had been his intention it is improbable that he would have left their preservation to depend on the casualty of his executors not choosing to make a sale. In the latter clause he expressly excepts his family pictures, and he has not said that any other articles are to be considered as heir-looms. Why then should the Court tie up this property when there is no presumption of any intention on the part of the testator to do so? There is a general power to the executors to sell every article, except the specific legacies and family pictures, at every place. What they might happen to leave, (and if he had not here again used the words "family pictures," there could not have been a doubt), are to go to *Richard Lumley* if living, in trust for him for his own proper use and benefit. This clause is extremely plain;  
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It does not give them to him for life, but for his own proper use and benefit without qualification. The words which follow are applicable only to another event which did not take place, viz. if the defendant should not be living; it is therefore unnecessary to follow that part of the contingency. In the event which happened it was given to the defendant for his own use, and it is open to the observation that it would equally have gone to him if he had not been the owner of *Ragford*. If the words admit of a plain interpretation the Court is bound to give effect to them. Respecting the family pictures I have some doubt. In the first clause the testator having expressly declared that they should be *heir-looms*, the Court is not to suppose that he dropped that intention, but will endeavour to construe the subsequent words with reference to the power. The defendant is to have the family pictures, but they are to be *heir-looms*, and to be enjoyed as *heir-looms*, because the Court is warranted by the express words in the former clause of the will so to confine the bequest. A personal enjoyment by the defendant was compatible with the intention that they were to be *heir-looms*. That was the course adopted by Lord Hardwicke, in *Traford v. Traford* (a). I am inclined to think the Court may go this length, though such a construction may be considered open to the objection of separating the latter clause, and giving the defendant an absolute interest in one part of the property, and a qualified interest in another: but it will be giving effect to the testator's declared intention that the family pictures should be *heir-looms*, and also to his predilection for the person to whom he had before given a large estate. My opinion therefore is, that the family pictures are *heir-looms*, but that the defendant took the absolute interest in the other articles of property.

(a) 3 Atk. 347.

1818.  
~~Wm~~  
 SAVILE  
 v.  
 The Earl of  
 SCARBOROUGH.



1818.

ROLLS,  
June 12.

## SKRYMSHER v. NORTHCOTE.

A testator gave the residue of his personal estate to trustees, in trust for his daughters *A.* and *B.* equally for their lives for their separate use, and afterwards for their children; and in case of the death of either of them without leaving any issue who should become entitled to her share, upon trust to pay or transfer 500*l.* Bank annuities, part of such moiety, to *C.* and the interest of the last-mentioned moiety to be paid for the separate use of the survivor of *A.* and *B.* during her life, in the same manner as her original moiety; and after the death of the survivor of *A.* and *B.* the remainder of the moiety of the one first dying without issue, and the original moiety of the survivor, to be in trust for the children of the survivor, in the same manner as their original moiety; and after the death of the survivor of *A.* and *B.* without leaving issue who should become entitled, he bequeathed one equal half part of all the residue of the said trust monies to *D.* absolutely, and the other equal half part thereof to *C.* The name of *C.* was afterwards struck out by the testator. *B.* died without issue:—Held, that the 500*l.* Bank annuities was undisposed of, and belonged to the testator's next of kin.

**SIMEON COLEY**, by his will dated the 19th of June 1794, after directing the payment of his debts, and bequeathing some legacies, gave to trustees all the residue of his effects, upon trust to sell and convert into money all such parts thereof as should not consist of money at his decease, and invest the same, together with all the rest of his effects not already invested in the funds, in the purchase of 5 per cent. Bank annuities, and should stand possessed of all his effects, and of the funds or securities for the same, upon trust to pay and apply the dividends and annual produce between his two daughters *Elizabeth Amelia Coley*, and *Helen Coley*, for their separate use during their respective lives; and after the respective decease of his said daughters, their respective half parts of his said trust estate, should be in trust for their respective children: “And in case of and after the death of either of my said daughters *Elizabeth Amelia*, “and *Helen Coley*, without leaving any issue entitled or “who shall become entitled to the half part or share of “her so dying, then as to the half part or share of her whose “issue shall so fail, upon trust to pay or transfer 800*l.* “5 per cent. Bank annuities, part of such moiety unto my “son *Simeon Coley*, his executors and administrators: And “upon trust to pay or transfer 500*l.* like annuities, other “part of such moiety, unto my (a) [daughter *Hannah North-*

(a) The words between brackets were struck through with a pen in the original will, but so as to remain legible.

“cote,

1818.

SKRYMSHER  
v.  
NORTHCOTE.

"cote, the wife of *Thomas Northcote*, of *Berkeley Street*,] in  
"the Parish of *St. James, Clerkenwell*, in the county of  
"Middlesex, Goldsmith, her executors and administrators."

And upon trust to pay and apply the interest, dividends, and annual produce of the remaining part of such last-mentioned moiety of the said trust monies and securities, to and for the separate use of the survivor of his said two daughters during her life, in the same manner as her original moiety: and after the death of the survivor of his said two daughters *Elizabeth Amelia Coley*, and *Helen Coley*, the remainder of the moiety of his daughter first dying without issue, and the original moiety of the survivor of his said two daughters, to be in trust for the children of the survivor of his said two daughters *Elizabeth Amelia*, and *Helen*, in the same manner as their mother's original moiety. And in case of and after the decease of the survivor of his daughters *Elizabeth Amelia*, and *Helen*, without leaving any such issue who should live to become entitled to the said trust monies, then he bequeathed one equal half part of all the residue of the said trust monies unto his son *Simeon Coley* absolutely, and the other equal half part thereof [(a) "unto my daughter the said *Hannah Northcote*,"] her executors, administrators, and assigns; and he appointed *John Swertner*, and his son *Simeon Coley*, executors, and gave them 10*l.* each, for their trouble in the execution of the trusts. In a codicil dated the 19th of June 1798, the testator used the following words: "I razed the name of "*Northcote* out of my will, with my own hand.—S. *Coley*."

The testator died soon afterwards, leaving four children, *Simeon Coley*, *Hannah Northcote*, *Elizabeth Amelia Burrow*, and *Helen Coley*, who were his next of kin. *Helen Coley* died unmarried and without issue, having by her will given all her property to her sister *Elizabeth Amelia Burrow*, and appointed her sole executrix. *Simeon Coley* the son died on the 13th of March 1808, having by

(a) These words were struck through as before.

his

1818.  
  
 SBYRNASHER  
 v.  
 NORTHCOTE.

his will dated the 30th of March, in the same year, given all sums of money and other property whatsoever, to which at the time of his decease he should be entitled under or by virtue of the will of his father, and the stocks, funds, and securities in which the said sums of money and other property should be invested at the time of his death, to trustees for his two daughters *Frances Elizabeth*, now the wife of *William Croft Fish*, and *Ann Amelia*, now the wife of *Charles Sbyrnasher*.

The bill was filed by Mr. and Mrs. Sbyrnasher, and Mr. and Mrs. Fish, for ascertaining the interests of the parties under the wills of the father and son; and the only question made at the hearing was respecting the 500*l.* five per cent. Bank annuities, part of *Helen Coley's* moiety, given to *Hannah Northcote* in the event of the death of *Helen Coley* without issue.

Mr. Trower and Mr. Maddock for the plaintiffs, Mr. Hart and Mr. Hone for next of kin of the first testator, in the same interest; and Mr. Bell for the executors of *Simeon Coley*, the son, contended, that although in the case of the bequest of a legacy which is afterwards struck out or revoked by the testator or which in any manner fails, the residuary legatee is entitled, a different rule prevails in cases like the present, where the gift is of a part of the residue, which being now undisposed of, belongs to the next of kin or their representatives. In *Leake v. Robinson* (a), Sir William Grant, after observing that with regard to personal estate every thing which is ill given by the will falls into the residue, and that it must be a very peculiar case indeed in which there can at once be a residuary clause, and a partial intestacy, expressly excepts the case of some part of the residue itself being ill given. The case of *Cresswell v. Cheslyn* (b), is very much in point with the present. The testator there

(a) 2 Meriv. 392.

(b) 2 Eden 123.

gave the residue of his property to his three children equally as tenants in common; by a codicil he revoked the appointment of one of his residuary legatees, and gave her a legacy in lieu thereof; and Lord Northington held that as the testator had made no new gift by the codicil of the revoked share, the other residuary legatees could have no greater interest than they had by the original will; the next of kin were therefore declared to be entitled to the third share, the bequest of which was revoked by the codicil: and the decree was affirmed by the House of Lords (a). In *Bagwell v. Dry* (b), the testator bequeathed the surplus of his personal estate to four persons equally to be divided between them share and share alike: one of the residuary legatees died in his life-time; and Lord Macclesfield held that the devise of his one-fourth became void, and was as so much of the testator's estate undisposed of. And in *Page v. Page* (c), a similar determination was made by Lord King.

1818.  
SKRYMSHER  
v.  
NORTHCOTE.

Mr. Parker for the defendant *E. A. Burrow*, the other residuary legatee, contended that the effect of the revocation was the same as if the legacy of 500*l.* Bank annuities to Mrs. Northcote, had never been inserted in the will, and that Mrs. Burrow, in addition to her share of the capital of the 500*l.* Bank annuities in her own right as one of the testator's next of kin, and her share as executrix of *Helen Coley*, was also entitled to the dividends of the 500*l.* Bank annuities, during her life.

*The MASTER of the ROLLS.* The question is, whether the 500*l.* five per cent. Bank annuities are to be considered as part of the residue. There is a different rule as to residue from that which prevails as to ordinary legacies; for it is clear on the authorities that when part of the residue is in any event undisposed of, it does not again assume the nature of residue, and go to augment the shares of other residuary

(a) 3 *Towl. P. C.* 246.

(b) 1 *P. Wms.* 700.

(c) 2 *P. Wms.* 469.

1818.  
  
 SKRYMNER  
 v.  
 NORTHCOTE.

legatees. Residue affects every thing not antecedently disposed of. If one moiety had been given to each daughter, and he had struck out the name of one of them, the effect would not have been to give to the other the whole residue; to consider it so would be in effect to hold that a gift of one half of the residue would carry the whole. Whatever argument applies to the whole of the half applies to a part of it, for it is merely a sub-division of moieties. He divides the residue, and gives part of it, namely, 500*l.* five *per cent.* Bank annuities, to his daughter *Hannah Northcote*; and when he revokes that bequest he substitutes no person in her place. Having once formed part of the residue, it is undisposed of, and belongs to the next of kin.

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The decree declared, that the sum of 500*l.* five *per cent.* Bank annuities, in the will of *Simeon Coley* the elder, given to *Hannah Northcote*, whose name was afterwards struck out of the will, remained undisposed of, and together with the dividends which became due thereon since *Helen Coley's* death, became distributable amongst the next of kin of *Simeon Coley* the elder, living at his decease; and directed such dividends to be paid as follows; one-fourth to the executors of *Simeon Coley* the younger, one-fourth to *Hannah Northcote*, one-fourth to *Elizabeth Amelia Burrow*, and the remaining fourth to *Elizabeth Amelia Burrow*, as executrix of *Helen Coley*: and directed a transfer of the stock accordingly, after payment of so much of the costs of the suit as should be apportioned in respect of the question relative to the 500*l.* five *per cent.* Bank annuities. The decree also directed that the dividends of the trust funds after deducting the 800*l.* and 500*l.* five *per cent.* annuities, and the costs, should be paid to the defendant *E. A. Burrow*, during her life, or until further order; and on her death any person interested therein to be at liberty to apply to the Court concerning the same.

DILLON

DILLON v. PARKER.

1818.

Rolls.

April 9, 13, 21,  
23.

June 2.

**S**IR Henry John Parker, Bart. being seised in fee of the Manor of Tatton, in Worcestershire, and of a messuage in Salisbury Court, Fleet Street, London, and being entitled to a farm and lands in the parish of Tredington, in Worcestershire, held by lease for three lives under the Bishop of Worcester; My Indentures of lease and release, dated the 1st and 2d of October 1741, in consideration of the marriage then intended, and soon afterwards solemnized, between him and Catherine Page, his second wife, and of 5000*l.* her marriage portion, conveyed all the above mentioned estates, and all

A. tenant for life, remainder to B. his only son in tail, remainder to A. in fee. B. died in A's life-time without issue, and without having barred the remainder, having by his will given all his estates in very general terms to A. for life, and from

and after his decease, the settled estates by name, and also estates of which he was himself seised in fee, "and all other estates which descended or came to him, or should descend or come to him from his father," to C. and D. his sisters of the half blood, as tenants in common, in fee, and his personal estate to A. whom he appointed executor; and having by a codicil devised to A. in fee, a freehold estate, he had purchased since the execution of his will, On B's death, A. proved his will, possessed his personal estate, mortgaged for his own benefit the estate devised by the codicil, enjoyed during his life all the settled estates, and also the real estates whereof B. was seised in fee. A. died two years after B. having by his will, which was executed six weeks after B's death, devised the settled estates and all other his estates to trustees for a term of years, upon trust for payment of his debts, and for raising money for renewing the leases of part of the settled estates which were held by lease for lives, with remainder to C. and D. as tenants in common for life, with survivorship between them, and with remainders to their issue in strict settlement, with remainders over, including a limitation to F. for life. On A's death, C. and D. entered and enjoyed all the estates for fourteen years, when C. died without issue, having devised all her estates to D. in fee. D. continued in possession of the whole till her death, about twenty-nine years after the death of C. During the periods of C. and D.'s enjoyment they on various occasions executed deeds containing recitals of the will of B. and describing themselves as devisees for life under it; and on renewals of the lease of part of the settled estates, D. paid the fines and expences out of her own monies, but it appeared from several letters written by her at those times, that she considered herself as having a right, which she declined to exercise, of charging the estate with the amount. D. died without issue, leaving G. her heir at law, and having by her will devised to G. in fee, part of the settled estates by name, and the residue of the settled estates by name to E. in fee, (who died in her life-time,) and bequeathed 500*l.* to F. and appointed him executor.

On a bill by G. against F. who had become entitled to an estate for life in possession under the will of A. praying a declaration that A. by accepting the benefits of B's will, had elected to conform to its devise; that the plaintiff was entitled to the estates comprised in the settlement, and that F. might elect to take under or against the will of D. :—

Held, 1. Supposing A. had made such election, (which the Court was of opinion was not sufficiently apparent from the above circumstances), yet that C. and D. had elected and bound themselves to take under the will of A.

2. That F. was bound to elect either to give up the legacy of 500*l.* bequeathed to him by D. or that part of the settled estate which she devised to G.

1818.

W  
DILLON  
v.  
PARKER.

other the hereditaments wherein he or any person or persons in trust for him then had any estate of inheritance or freehold situate within the Manor of *Talton* and *Tredington*, to *John Page* and *William Travell*, and their heirs; To the use of *Sir Henry John Parker* until the marriage; with remainder To the use of *Sir Henry John Parker* for his life; remainder, as to the freeholds, to the trustees to preserve contingent remainders; remainder to the first and other sons of the marriage in tail male, with remainder, To the use of *Sir Henry John Parker* in fee. And as to the leaseholds, after the death of *Sir Henry John Parker*, and his intended wife, and the survivor of them, To the use of such son of *Sir Henry John Parker* by *Catherine* his intended wife as should be his heir for the time being, for and during the continuance of that estate, and of such life or lives either then or thereafter in being, for which the premises then were or should be granted; and in case such son should not at the time of the decease of the survivor of *Sir Henry John Parker* and *Catherine Page*, be of full age, or otherwise should not afterwards attain his full age of twenty-one years, then To the use of such son and heir of the body of *Sir Henry John Parker* on the body of *Catherine Page* his intended wife, as should first attain his age of twenty-one years, for and during the continuance of the said estate, and of such life or lives as aforesaid; and in default of such son and heir as aforesaid in being at the time of the decease of the survivor of *Sir Henry John Parker* and *Catherine Page* his intended wife, or then in ventre sa mere, or afterwards born alive, or in case all and every such son and sons of *Sir Henry John Parker* on the body of *Catherine Page* his intended wife, to be begotten, as should be living at the death of *Sir Henry John Parker* and *Catherine Page*, or the survivor of them, or born after the decease of *Sir Henry John Parker*, should happen to die before any such son should attain his said age of twenty-one years, then To the use of *Sir Henry John Parker*, his heirs and assigns, during the life or lives in being for which the premises then were or might be held and enjoyed.

By

By this marriage there were three children; one son, *John Parker*, and two daughters, *Catherine*, who married *C. F. Garstin*, and *Margaret Sophia*, who married *John Strode*. *Dame Catherine Parker* died in the year 1750, leaving her husband and her son and daughters surviving. In 1753, *Sir Henry John Parker*, who was entitled in fee as the heir at law of *Robert Hyde*, deceased, to an estate at *Hatch*, in *Wiltshire*, subject to an existing life interest, settled one moiety of it so as to become vested in his son *John Parker* in fee, on his attaining the age of twenty-one; and in 1758, he sold and conveyed the other moiety of the same estate to *John Page*, in fee, by whom it was devised to *John Parker* in tail.

1818.  
  
 DILLON  
 v.  
 PARKER.

*John Parker* attained the age of twenty-one in the beginning of the year 1766, and soon afterwards suffered a common recovery of the intailed moiety of the *Hatch* estate, declaring that it should come to such uses as he should by deed or will appoint. Being thus seised in fee of one moiety, and having a power of appointment over the other moiety of the estate at *Hatch*; being also seised in fee of a freehold house in *Shorter's Court*, *Throgmorton Street*, *London*; being tenant in tail in remainder of the estates comprised in the settlement of 1741; and being possessed of considerable personal estate, part of which he was entitled to under the will of *John Page*, *John Parker* by his will dated the 2d of *August* 1769, devised all his freehold and leasehold estates whatsoever and wheresoever, that he was seised or possessed of, or otherwise was or should be entitled unto in reversion, remainder, or expectancy, unto his father *Sir Henry John Parker*, and his assigns for his life; and from and after his decease, he gave and bequeathed his estates in *Shorter's Court*, in the City of *London*, and the moiety of his estates at *Hatch*, in the County of *Wilts*, and also all other his real estates devised to him by the will of his late grandfather *John Page*, with the appurtenances, unto *Harry*, (afterwards *Sir Harry*) *Parker*, and *Daniel Fox*, in fee, upon various trusts for the benefit of his sisters *Catherine* and *Margaret Sophia*, and their issue. He also gave and devised after the death of his

his



1818.  
 ~~~  
 DILLON  
 v.  
 PARKER.

his said father, the Manor and Capital Messuage called *Talton*, with the estate thereto belonging, the farms called *Tredington Farm*, and *Nolland's Farm*, in the parish of *Tredington*, and all other his Manors and estates in *Worcestershire* and *Warwickshire*, his house in *Salisbury Court*, the other moiety of his estates at *Hatch*, and all other estates whatsoever, which descended or came to him, or which should descend or come to him from his said father, unto his two sisters *Margaret* and *Ann Parker*, (daughters of *Sir Henry John Parker*, by his first wife), their heirs, executors, administrators, and assigns for ever, as tenants in common; and all the residue of his personal estate he gave to his father, whom he appointed sole executor, in the event of his surviving him; but if his father should die in his life-time, he appointed *Harry Parker* and *Daniel Fox* executors.

After the date of his will, the testator purchased a freehold estate at *Arnscoth*, in the parish of *Tredington*; and by a codicil dated the 2d of *September* 1769, after noticing his will, he gave and devised unto his father *Sir Henry John Parker*, his heirs and assigns for ever, all that his estate situate in the parish of *Tredington*, which he had lately purchased of *Robert Mansell*; and after stating that his said father formerly executed a bond in the penal sum of 2000*l.* conditioned for the payment of 1000*l.* with interest to his late grandfather *John Page*, whereof he (the testator) was entitled to one-third, and his sisters *Catherine* and *Margaret Sophia*, to two-thirds; he declared that no part of the principal and interest due on the bond, or on any other bond or security should be paid by his said father, but that the same bond and all other bonds and securities should be delivered up to him to be cancelled; and he enjoined his said sisters to forbear from any suit or prosecution of his said father, on account of the said bond, or in any other respect, under pain of forfeiting all bequests in their favour.

*John Parker* died in *September* 1769, unmarried and without issue, leaving his father *Sir Henry John Parker*, his sisters

sisters of the half blood, *Margaret* and *Ann Parker*, and his sisters of the whole blood, *Catherine Garstin* and *Margaret Sophia Stode*, surviving him; the two latter being his heirs at law.

1818.  
DALLON  
v.  
PARKER.

*Sir Henry John Parker*, on the death of *John Parker*, proved his will, possessed his personal estate, and entered into and continued during his life in possession of the estates of which his son was seized in fee; and by indentures of lease and release dated the 25th and 26th of May 1770, he mortgaged to *Dorothy Tyler*, for 900*l.* the *Armscott* estate devised to him in fee by the codicil.

*Sir Henry John Parker* by his will, dated the 18th of November 1769, after directing his debts to be paid, gave and devised to *Henry Parker* and *Daniel Fox*, all that his Manor of *Talton*, and all that his Capital Messuage or tenement wherein he then dwelt, called *Talton House*, and all the farms, lands, tenements, and premises thereto belonging, and all other his freehold manors and hereditaments in *Worcestershire* and *Warwickshire*, and also his freehold house in *Salisbury Court*, *Fleet Street*, *London*, and also one undivided moiety or half part of the Manor and estates situate at *Hatch*, or elsewhere in the County of *Wilt*, and which descended to him as heir at law of the family of the *Hyder*, and all other his freehold estates whatsoever and wheresoever, that he had a power of disposing of; to hold to *Henry Parker* and *Daniel Fox*, their heirs and assigns for ever, To the use of them, their executors, &c. for the term of one thousand years to be accounted from the time of his decease, upon the trusts afterwards declared; with remainder as to one undivided moiety of all the premises, To the use of his daughter *Margaret Parker* for life, and as to the other moiety, To the use of his daughter *Ann Parker* for life, with limitations to their respective sons successively in tail, and with various remainders over, including a limitation to the defendant *Sir William Parker*, Baronet, for his life.

The

1818.  
 ~~~~~  
 DILLON  
 v.  
 PARKER.

The testator declared it to be the true meaning of his will, that the above-mentioned estates should, after the decease of his daughters *Margaret* and *Ann*, without issue male, constantly go along with and descend unto the right heir male of the *Parker* family, in the manner he had above limited the same, as such heir male would inherit his title; therefore it was his will that such his estates and title should descend and be enjoyed together as long as might be, and the laws of *England* would permit.

The testator also devised to *Henry Parker* and *Daniel Fox*, all his leasehold estates situate in the parish of *Tredington*, and in the parish of *Hampton in Arden*, in the County of *Warwick*, and all other his leasehold estates; to hold to them, their executors, administrators, and assigns, for all the estates, terms of years and interests that he should have therein respectively at the time of his decease, subject nevertheless to the rents and covenants in the several original lease or leases of the premises respectively reserved and contained on the lessees part to be performed: Upon Trust to permit the same person and persons one after another respectively to take and enjoy his said leasehold premises, and to receive the rents and profits thereof, in the same manner as such person or persons would by his will be entitled to his freehold estates; it being his true intent and meaning that his leasehold estates should be enjoyed with his freehold estates, and remain to the same persons, and to the same uses, as his freehold estates, as long as might be, and the laws of *England* would permit.

The term of one thousand years was declared to be limited to *Parker* and *Fox*, Upon Trust from time to time by sale or mortgage of the freehold and leasehold manors, messuages, &c. or such parts thereof as he or they should think proper, or with the rents and profits, or otherwise as they in their discretion should think fit, to raise such sums of money as should from time to time be sufficient for payment of his just debts and legacies, or any part thereof, in case his personal

sonal estate should be insufficient for those purposes; and also such further sum or sums of money as should from time to time be sufficient and necessary to pay any fine or fines for the renewal of any lease or leases, or putting in any life or lives in the room or place of such as might happen to drop in such leasehold premises, or any part thereof; and he directed that all such new leases should be vested in *Henry Parker* and *Daniel Fox*, or the survivor of them, his executors, &c. upon the same trusts as he had before declared concerning the same leasehold premises by his will; it being his true meaning that his leasehold premises should from time to time always continue subject to the like trusts upon the renewal of every lease as he had above intended to devise and limit the same premises: And he directed that if the said several sums of money above mentioned, should be paid by the person or persons to whom the next and immediate remainder or remainders of the premises expectant on the term of one thousand years, should for the time being belong by virtue of his will, in such manner as the same sum or sums of money should be wanting, according to the true meaning of his will, that then and in every such case the said monies should not be raised by virtue of the term of one thousand years, but the said term should cease for the benefit of the persons to whom the next and immediate reversion or remainder of the premises expectant on the term, should for the time being belong by virtue of his will.

After reciting that by the will of *John Page*, late of *Putney*, Esq. several sums of money therein particularly mentioned, were given to his grandson, the testator's late son *John Parker*, Esq. deceased, his executors or administrators, upon the contingencies in such will particularly expressed; the testator *Sir Henry John Parker* declared his will to be that in case any sum or sums of money should become due and payable to, or become vested in the testator as executor of his said son *John Parker*, or to his own executors or administrators, by virtue of the said will, then he gave and bequeathed

1813.  
DILLON  
v.  
PARKER.

1818.  
 ~~~~~  
 DALLON  
 v.  
 PARKER.

bequeathed all such sum and sums of money as he was, could, should, or might be entitled unto, or have a power of disposing of, unto *Henry Parker* and *Daniel Fox*, their executors, &c. upon trust as soon as conveniently might be, after the said trust monies should become vested in them by virtue of his will, to lay out such trust monies in the purchase of freehold lands in the Counties of *Warcester* or *Warwick*, which when purchased should be conveyed to *Henry Parker* and *Daniel Fox*, or some other proper trustees, and their heirs, upon trust, and for the same uses, &c. as are above mentioned and declared, concerning his freehold estates by virtue of his will.

The testator after further reciting that by virtue of the last will and codicil of his son *John Parker*, he was become entitled to certain devises and estates therein particularly mentioned; by reason of certain forfeitures therein also mentioned, which would become vested in the testator, his heirs, executors, and administrators, when such forfeiture or forfeitures should be incurred: he did thereby devise and bequeath all the freehold and leasehold estates, lands, tenements, and hereditaments, which he could, should, or might be entitled unto, by virtue of the said will and codicil of his said son, or otherwise howsoever, unto *Henry Parker* and *Daniel Fox*, their heirs, executors, administrators, and assigns, upon trust, and to and for such and the same uses, trusts, &c. and subject to the same provisos and powers as are before declared concerning his said freehold estates by virtue of his will.

The testator after some small legacies gave the residue of his personal estate to his two daughters *Margaret* and *Ann Parker*, and appointed them executrixes.

The testator afterwards executed a codicil by which he varied the order of the limitations of his real estates as to certain branches of his family, and expressly exempted his personal estate from the payment of his debts and legacies, in order that his personal estate might go free and clear to his executrixes,

Sir

Sir Henry John Parker died in October 1771, without issue male, leaving his four daughters Margaret and Ann Parker, Catherine Garstin, and Margaret Sophia Strode, his co-heirs at law. On his death Margaret and Ann Parker proved his will, entered into possession of the estates devised to them by his will, and continued in such possession during their joint lives.

Margaret Parker died in May 1785, unmarried; having by her will devised her moiety of certain estates in Leicestershire and Northamptonshire, which descended to her and her sister from their late mother, and her moiety of the Hatch and other estates in Wiltshire, devised to her and her sister jointly by her brother, and all other her estates, to her sister Ann Parker, in fee, who was also her heir at law, and whom she appointed sole executrix. Ann Parker on the death of Margaret, entered into possession and into the receipt of the rents of the whole of the estates devised to her and her sister by the wills of their father and brother, and by her will, dated the 1st of August 1811, devised (among other estates) the said messuage in Salisbury Court, to the plaintiff John Joseph Dillon, Esq. his heirs and assigns forever; she also gave and devised the said Manor and Mansion-house at Talton, the said farm at Tredington, and her estates at Hatch aforesaid, to Harry Parker, (father of the defendant Sir William Parker), in fee, subject to an annuity; she appointed the defendant executor of her will, and gave him a legacy of 500*l.* and gave the residue of her property to the plaintiff and his sister. Harry Parker (the defendant's father), died in the life-time of Ann Parker, who died on the 26th of January 1814, unmarried and without issue, leaving the plaintiff her heir at law.

1818,  
Dillon  
v.  
Parker

The bill, which was filed by John Joseph Dillon, against Sir William Parker, prayed a declaration that Sir Henry John Parker by accepting the benefits given to him by the will and codicil of John Parker his son, elected and bound himself

1818.  
  
 DILLON  
 v.  
 PARKER.

himself to conform thereto in regard to the devises contained in that will of the settled estates, and that the plaintiff was entitled to those estates, and that the defendant might be decreed to convey them to the plaintiff, and to deliver up all deeds, &c. relating thereto; charging that in consequence of *Sir Henry John Parker* having been in embarrassed circumstances, and of his having applied to his son for pecuniary assistance, and proposed that he should become the purchaser of his father's interest and reversion in the estates comprised in the settlement of 1741, some agreement in writing was executed between them, in consideration of which and of a conveyance of the estates agreed to be made by him to his son, the latter agreed to pay the sum of 700*l.* and a clear annuity of 200*l.* to his father for his life; and that the 700*l.* was accordingly paid to *Sir Henry John Parker*, by his son, whereby the former was enabled to make an arrangement with his creditors; and that in pursuance of that or some other agreement, *John Parker* entered into possession of all the lands described in the settlement, and himself occupied the Mansion-house of *Talton*, and fitted up the same at a considerable expence, and paid or allowed all the expences of housekeeping therein, and resided there as the owner to the time of his death, was also let into possession at the house in *Salisbury Court*, and expended 1,500*l.* in rebuilding it; and laid out other sums in the repairs and improvements of the settled estates: that *Sir Henry John Parker* enjoyed during his life, the estates devised to him for life by his son's will, and particularly the estates at *Hatch* and *Shorter's Court*, and also entered into possession of and mortgaged the freehold estate at *Tredington*, devised to him by the codicil, and that he thereby and otherwise elected to take the benefits and bequests given to him by his son's will: also alledging acts of the same nature by *Margaret* and *Ann Parker*.

The defendant by his answer stated that some agreement was entered into between *Sir Henry John Parker*, and his son, whereby the interest of the former in the settled estates was

was to be transferred to the latter, but that it contained a proviso for making it void in case *John Parker*, should die in his father's life-time, which event happened: he also denied that any election had been made by Sir Henry *John Parker* to take under the will of his son, but alledged that he had always treated it as a nullity; the answer also stated various acts done by *Margaret* and *Ann Parker*, indicating their intention to take under the will of their father, particularly several deeds (afterwards mentioned), which contained recitals of the will, and which described them as devisees for life under it.

By a supplemental bill, the plaintiff prayed that the defendant might elect to take either under or against the will of Mrs. *Ann Parker*, and that in case of his taking the legacy of 500*l.* thereby given to him, he might give up to the plaintiff the house in *Salisbury Court*.

It appeared by the evidence on the part of the plaintiff, that *John Parker* had, after he attained twenty-one, been in possession of parts of the settled estates, particularly the house in *Salisbury Court*, which he had repaired at a considerable expence, and had let to a tenant. On the part of the defendant were given in evidence several deeds executed at different times by *Margaret* and *Ann Parker* after the death of their father, recognizing his will as a valid instrument, and describing themselves as devisees for life: also several letters written by Mrs. *Ann Parker* after her sister's death on the subject of the renewal of the lease of that part of the settled estate which was leasehold; from which it appeared that she paid the fines and fees for renewal out of her own money, but that she considered herself as having a right to charge the estates with the amount, and declined doing so. The instruments and letters above mentioned, and all the documentary evidence relied on, are so fully stated and commented on by the Master of the Rolls in his judgment, that it has not been thought necessary to introduce a particular statement of them in this place.

The

1818.

~  
DILLON  
v.  
PARKER.



1813.  
 ———  
 DALLAN  
 v.  
 PARKER.

The agreement alledged to have been made between *Sir Henry John Parker* and his son was not produced: evidence of its contents was offered by the defendant, but the evidence was held by the Master of the Rolls not to be admissible. It also appeared in evidence, that although *Sir Henry John Parker* had at one period been in embarrassed circumstances; and considerably involved in debt, his debts had been discharged partly out of the funds provided by himself for that purpose in his life-time, and partly by the trusts of the term of years created by his will.

*Mr. Hart, Mr. Bell, and Mr. Wilson*, for the plaintiff. It is a clear principle of equity that if a person takes on himself to dispose by will of an estate which belongs to another, to whom he gives a benefit, the owner must be put to his election to confirm the will throughout, or to renounce the provision which it makes in his favour. If he accepts the provision, and acts in such a manner as to prevent the other parties interested from being in the same situation as they would otherwise have been in, it is an election. In the present case *Sir Henry John Parker* could not claim any thing under the will of his son, unless he gave up the estates, subject to his own life interest, to his daughters *Margaret* and *Ann* in fee. He entered on all the estates; he never paid the 1000*l.* which was due from him to the estate of *Page*; he proved his son's will, and possessed himself of the residue of his effects; he also mortgaged for his own benefit the *Arnscott* estate devised to him in fee by the codicil. These acts amount to a decisive acceptance of the provisions of the will of *John Parker*: and if he actually made his election, it would be binding on those who claim under him, according to *Harvey v. Ashley* (a), and many other authorities. Having thus bound himself to conform to the will of his son, he executed his own, whereby he attempted to give to the estates a direction entirely different from that which they

(a) 3 Atk. 616.

would

would have taken under the will of the son. The effect of his own will is to cut down the estate in fee-simple limited by his son's will to the two daughters, to an estate for life, with remainders to their issue. If in addition to the fact of *Sir Henry John Parker* having entered under his son's will, any thing could be wanting to shew his acceptance of the provisions of that will, the recitals in his own will are, if possible, still more conclusive evidence of the fact. With regard to the daughters, if their title accrued under the will of their father, they took estates for life; if under that of their brother, they took estates in fee-simple; in either way they were entitled to the possession. It was therefore immaterial for them to consider under which of the wills they should take. They entered into possession; and it will be insisted by the defendant, that even supposing the son's will to have put the father to his election, and that he actually elected to take under it, yet the daughters *Margaret* and *Ann* elected to take under the will of their father, and in opposition to the better estate given to them by that of their brother; in other words, that they elected to take an estate for life instead of an estate in fee-simple. It appears that these ladies enjoyed the whole of the estates till one of them died unmarried, having devised all her estate to her sister, who was her heir at law, and who then became entitled to the possession of the entirety. *Ann*, the surviving sister, devised her property in *Salisbury Court* to the plaintiff in fee, and her estates at *Talton* and *Tredlington* to *Sir Harry Parker* (the defendant's father) in fee, assuming the character of owner of that estate, and expressly charging it with an annuity. But the devise to *Sir Harry Parker* having lapsed by his death in her life-time, the plaintiff is now entitled as heir at law of *Ann Parker*. The devise contained in her will is no otherwise material than as it shews that whatever might be the effect of her acts as claiming under her father's will, she did not conceive herself to have made the election insisted on by the defendant; for if she thought she was entitled

1818.

  
 DILLON  
 v.  
 PARKER.

1818.  
 ~~~~~  
 DILLOP  
 v.  
 PARKER.

entitled under the will of her father, she would not have done so nugatory an act as to devise in fee-simple that to which she was only entitled for life. The evidence shews that Sir *Henry John Parker* was not in such circumstances as would enable him to make any gift, for he died indebted, and the equity of redemption of the *Arnscoff* estate was sold for the purpose of discharging his debts. The daughters continued in possession, and there was nothing to present the question of election to their minds. The case resolves itself into this: Sir *Henry John Parker* conclusively elected to take under his son's will; his daughters were also put to their election, which they made no otherwise than by shewing that they considered themselves in under the son's will. But whatever might have been the effect of the acts of *Margaret* and *Ann Parker* under other circumstances, those who now claim under Sir *Henry John Parker* cannot at this distant period, when it is impossible for the other parties to be placed in *statu quo*, be allowed to say, that although he enjoyed every benefit under his son's will, he did not make any election. It is clear that he never testified any dissent. It is true that he died soon after his son, and though the magnitude of the benefits depended on the continuance of his life, yet if he once took the benefit, and was not under any mistake respecting his rights, it was an election. Then the question will arise whether it is a case of absolute forfeiture, or of compensation, and whether, when a case of election arises, it is a forfeiture when the party does not abide by the will. The point was discussed before the Lord Chancellor, in *Tibbits v. Tibbits* (a), and *Green v. Green* (b), but has not yet been expressly decided. If this were a bill filed to put the party to his election, the case might admit of that doubt; but this is a case in which the party has actually made his election. In *Tibbits v. Tibbits* the question was whether the party was bound to elect, and if so,

(a) 2 *Meriv.* 96, note (a).

(b) 3 *Meriv.* 86.

what

what was to be the consequence; but here Sir *Henry John Parker* has actually elected and bound himself by his acts to confirm his son's title. He took under his son's will an estate for life in the real estate, and the absolute interest in the personalty; and he enjoyed during his life all those benefits. And with regard to the election supposed to have been made by his daughters, it is incumbent on the defendant to shew that they have elected, and for that purpose he must satisfy the Court that they received benefits under the will of their father, which imposed on them an obligation to confirm it: for it will be in vain for the defendant to shew that Sir *Henry John Parker* gave them property which he had a right to dispose of, unless they enjoyed it according to the terms of his will. The following authorities were referred to; *Noys v. Mordaunt* (a), *Cowper v. Scott* (b), *Streatfield v. Streatfield* (c), *Boughton v. Boughton* (d), *Butricke v. Brodhurst* (e), *Allen v. Poulton* (f), *Bigland v. Huddleston* (g), *Finch v. Finch* (h), *Macnamara v. Jones* (i), *Blake v. Bunbury* (k), *Wilson v. Lord John Townsend* (l), *Broome v. Monck* (m), *Thellusson v. Woodford* (n), a case before Lord Rosslyn referred to by Lord Redesdale in *Moore v. Butler* (o), *Birmingham v. Kirwan* (p), *Stratford v. Powell* (q).

1818.  
DILLON  
v.  
PARKER.

Sir *Samuel Romilly*, Mr. *Horne*, and Mr. *Shadwell*, for the defendant. To impose a necessity for election, it must be shewn that the testator intended to devise an estate in which he had not a devisable interest. The first question therefore is whether *John Parker* has expressed any such intention. A testator must *prima facie* be supposed to devise that which is his own, and the interest he has must be first

- (a) 2 *Vern.* 581.
- (b) 3 *P. W.* 119.
- (c) *Ca. Temp. Talb.* 176.
- (d) 2 *Ves.* 12.
- (e) 3 *Bro. C. C.* 88.
- (f) 1 *Ves.* 121.
- (g) 3 *Bro. C. C.* 285.
- (h) 1 *Ves. jun.* 534.

- (i) 1 *Bro. C. C.* 481.
- (k) 1 *Ves. jun.* 514.
- (l) 2 *Ves. jun.* 693.
- (m) 10 *Ves.* 597.
- (n) 13 *Ves.* 209.
- (o) 2 *Scho. & Lef.* 267.
- (p) 2 *Scho. & Lef.* 444.
- (q) 1 *Ball & Beatty*, 1.

1818.  
 ~~~  
 DILLON  
 v.  
 PARKER.

resorted to. The first clause of the will contains merely a general devise to his father, and which cannot be applied to property not his own. Nor will the next clause assist the construction contended for by the plaintiff. The Court must resort to as strong evidence as that which existed in *The Earl of Darlington v. Pulleney* (a), to shew that he conceived something to be his estate which was not so in point of fact. In the subsequent parts of the will he must be supposed to refer either to the interest he had under some agreement with his father, (for it is evident that an agreement existed, though evidence of its terms cannot now be produced) or to look forward to the possibility of his becoming entitled to the estates by descent from his father; for he expressly alludes to such an event. It is therefore not a case in which any question of election arises, for he had an interest in the estates he professed to devise. But if the Court should be of opinion that he meant to devise his father's estates, either immediately or after his father's death, and that the doctrine of election applies, it will remain to be considered, whether in point of fact, the father did elect; and also what he was bound to do in consequence of such election? It is said that he took benefits under the will of his son. But it is evident that he also took in opposition to it. There is at least as much reason for insisting that he did the one as the other. He has done acts which are consistent only with his taking in opposition to it. When a will raises an election, it does not impose on the party the necessity of making his election until he has full knowledge that it is necessary. There have been cases in which it has been held that a jointress who had been several years in possession of a provision made by will, was not bound to elect, unless she clearly knew of her obligation to do so (b). In the present case can it be said that Sir Henry John Parker's obligation to elect was so clear that

(a) Stated 2 Ves. jun. 552, 560.  
 (b) *Wake v. Wake*, 3 Bro. C. C.

255. S. C. 1 Ves. jun. 335, and the cases there referred to.

he was bound to elect instant? If a bill had been filed for election, it could not be held that his possession was an election before the hearing of the cause. His only act was a mortgage. It requires some authority to shew that such an act amounts to an election. There is an unreported case in which it was held that even where the party had sold the estates, it did not amount to an election. Election is the choice of the party: and it is said that there is in this mortgage his deliberate expression of his choice to abide by the will of his son. His own will was made six weeks after the death of his son, and he died after having enjoyed the estate only two years. It is impossible to make out a case that he actually elected. What was he to elect to do? To throw back the rents and profits of the two years. That is not only the amount, but the kind and degree of election, which he must have made. Supposing Sir Henry John Parker to have been bound to elect, and that he took benefits under his son's will, and yet enjoyed the settled estates in opposition to it, he could not be bound to do more than to make compensation. That is a point which has not yet been solemnly decided, but in *Dashwood v. Peyton* (a), though it was not the point directly in judgment, the Lord Chancellor incidentally speaks of it as a case for compensation. The cases have generally been so clear that the party without any difficulty makes his election: but here his death happened so long ago, that the Court would have to deal with his property, considering it merely as a case of compensation out of his personal estate; and if so, there would be a singular difficulty in the case; for though the daughters were their father's executrices, and the defendant is the executor of the surviving daughter, yet the plaintiff is her residuary legatee, and would be claiming compensation out of a fund which is already in his own power. In that point of view therefore

1818.  
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 DILLON  
 v.  
 PARKER.

(a) 18 Ves. 49. "Where a case of election is raised, it does not give a right to retain the thing itself, though it may give a right to compensation out of something else."

1818.  
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 DILLON  
 v.  
 PARKER.

the question would be nugatory. The will of Sir *Henry John Parker* created another election. It is clear that the legal estate was in him, and there can be no doubt that at law the effect of his will was to give the legal estate to all the devisees under that will in succession. If the daughters elected to take under the will of their father, it was not necessary for them to execute any instrument, for they had nothing which was to be the subject of conveyance. On the other hand, if they were to make an election in opposition to that will, a deed would be necessary, for the legal and equitable estates would then be in different persons. If they elected to take under their brother's will, they should have called for a conveyance from the persons who had the legal estate. But the legal estate is where it has been and ought to be. All persons claiming under the will would be trustees for them, and the equitable estate would be in themselves in fee. If on the death of their father they elected to take in opposition to his will, and under that of their brother, the consequence would be that they must have instituted a suit in equity, insisting that the legal estate was in trustees for them, and calling on the Court to decree a conveyance. If such a suit had been instituted, some defence would doubtless have been made; and the production of the agreement, respecting the terms of which there is now so much doubt, might have shewn something to vary or defeat this supposed equity of the daughters. But now after the lapse of more than forty years, the Court is called on to give effect to this supposed equity. When these ladies knew that their father had assumed the right to dispose of the estate in equity, it was their duty to set up any claim in opposition to it when all parties were living and all the documents were at hand to refer to; and the fact of their not having done so is decisive to shew that they meant to abide by the will of their father. If there was nothing more in the case, it would be impossible now to permit the heir at law to assert an equity which was never set up by them.

them, and to have persons made trustees for the heir, who were never made trustees for the ancestor. But it is clear that those ladies took steps quite inconsistent with the present claim. Being appointed executrixes of their father they proved his will, and though there might be doubts whether that act alone would be sufficient, they were also residuary legatees. The will limited the estates to trustees for a term of years to raise legacies and debts, from which the personal estate was by a codicil expressly exonerated for their benefit. If they had meant to assert an equity under the will of their brother, is it probable that they would have acquiesced under the will of their father, which charged the estate with his own debts? But it is clear that they did so acquiesce by various solemn acts which they have done, and which are decisive to shew that they elected to take under the will of their father. They were made parties to a mortgage of the estates, which recited the will of their father, and by means of which money was raised for the express purpose of paying his debts, legacies, and funeral expences. If they did not mean to take under his will, they had no right to touch a shilling of his personal property, for that was the very fund out of which the compensation must be made. By this mortgage the equity of redemption was reserved, not to *Margaret* and *Ann Parker* themselves, as it should have been if they had elected to take in fee under their brother's will, but to the persons for the time being entitled under the will of *Sir Henry John Parker*. They also executed a deed for raising money for renewing the lease of the *Tredington* estate; this is done by the trustees, but *Margaret* and *Ann Parker* join in the conveyance, and the equity of redemption is again reserved to the persons entitled under their father's will. A case of worse faith could not be imagined, than that after thus acquiescing, and lulling all parties into security, they meant afterwards to assert a right inconsistent with all the acts they had done, and when most of the parties should be dead. *Margaret Parker* died in 1785. By her will she devised to her

1818.

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DILLON  
v.  
PARKER.



1818.  
  
 DILLON  
 v.  
 PARKER.

her sister *Ann* her moiety of estates in *Leicestershire* and *Northamptonshire*, which she had an unquestionable right to dispose of. There is a clear counter-equity on the will of *Margaret Parker*; for *Ann* took under that will. *Margaret* had been content to take as tenant for life under the will of her father, and had removed the fund for compensation. It is clear that her intention was to give a bounty to her sister, by giving her estates of which both in law and equity she was clearly the owner. It would therefore be inconsistent to permit *Ann Parker* to disturb what her sister meant that she should acquiesce in, and after having executed the instruments before referred to. *Margaret* and *Ann Parker*, by recognizing the estate to be in the trustees, pledged themselves not to disturb the legal limitations in the will. They were under no disabilities. Their father had asserted a right to affect the estate by a long line of limitations, and instead of saying that they had any right, they acted inconsistently with the idea that they or any claiming under them would assert it. To consider that they had any intention to claim in opposition to their father's will, would be in effect to say, that when the father died they conceived it dangerous to assert their claim, for the agreement was in existence, and there were other circumstances which would render it unsafe; but that it might be brought forward forty or fifty years afterwards, when all the papers should be lost, and the material parties should be no more. The Court will not act on such an equity. The plaintiff says, that *Ann Parker* by her will, has asserted her right to the estate, but it is impossible that she could do away the effect of the deliberate acts of herself and her sister.

Mr. *Hart* in reply. The Court is as competent now to know all the facts as it would have been at the death of Sir *Henry John Parker*: and the present equity of the plaintiff has arisen within two years. Whatever doubts might exist respecting the intention of *John Parker* to dispose of the  
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settled estates under the general devise in the first clause of his will, it is clear he meant to include them in the subsequent clause, which expressly mentions the *Talton* and *Tredington* estates. Election is not confined to the case of a person devising property which is not his own. It extends to all devises, when it may afterwards turn out that some other person has the title, and that other person has a benefit, in which case he is bound to confirm the will. It is clear that the will of the son tendered to the father a case of election. It is therefore to be considered whether *Sir Henry John Parker* elected, and if he did, what are the consequences of that act. It is clear that a Court of Equity does not take parties by surprise, and fix them by acts done without a knowledge of their interests, or of the objects on which their election is to operate. In cases where parties have accepted their residuary shares before the accounts have been taken, the Court has suffered them to examine the state of the fund, and has afforded them every opportunity of knowing which would be the most for their benefit. Here there is no doubt that *Sir Henry John Parker* knew that it was a subject for election. He took benefits during the period of his enjoyment much larger than he could merely under the will of his son. The first step he took was to mortgage the *Arnscoff* estate for 900*l.* Can there be a more unequivocal act? He entered and enjoyed the *Hatch* and *Shorter's Court* estates, to which he had no right, except under the will of his son; and the circumstance of his having accidentally enjoyed them for the short period of two years, cannot affect the question. It is clear therefore that he elected to take under the will of his son. By his own will he disposed of the legal interest in these very estates. What then is the consequence of his election? Though there are some doubts whether the party electing is merely to make compensation, or is bound to relinquish all the benefits he takes, there is no case except *Streatfield v. Streatfield* (a), where the Court has acted on

1818.  
  
 DILLON  
 v.  
 PARKER.

(a) *Ca. Temp. Talb.* 176.

1818.  
  
 DILLON  
 v.  
 PARKER.

the precise quantity of compensation. There have indeed been cases of a peculiar description, where the Court has acted on quantity, when quantity alone was in the contemplation of the parties, as in cases on the Custom of *London*, where the only question has been respecting the quantity of money. But in the case of a specific thing, there is no authority except *Streatfield v. Streatfield*. It may be a question whether the directory part of Lord *Talbot's* decree in that case is right; but nothing can be more unequivocal than the language of the case. In *Noys v. Mordaunt* (a), the earliest on this subject, the rule is clearly laid down, that where a person is disposing of his estate among his children, and gives to one fee-simple lands, and to another lands intailed or under settlement, there is an implied condition that each party acquit and release the other. But supposing it to be doubtful whether this be a case for compensation or abandonment, the conduct of Sir *Henry John Parker* has rendered compensation impossible,

With regard to the supposed election by the *Misses Parker*, it may be observed, that what they enjoyed was perfectly consistent with their better title. Their entering into possession is no evidence of election to take under the will of their father; for they were entitled to all the estates under the will of their brother. But it is said that the daughters, by the instruments they have executed, and by letters they have written, have given unequivocal evidence of confirmation; and that they also took for their own benefit the personal estate of their father. The defendant however admits by his answer that the personal estate of Sir *Henry John Parker* was insufficient for the payment of his debts. In order to prove that they elected to take under his will, it must be shewn that they derived some benefit under it: if therefore there was no

(a) 2 Vern. 581.

property to form the ground of election, there cannot be an election. But supposing there was no election, it may be said that the circumstances amounted to a confirmation; and undoubtedly a child may gratuitously agree to confirm the will of a parent, and the heir of the child cannot object to the confirmation as being merely voluntary. One of the deeds referred to, executed in consequence of the trustees of Sir Henry John Parker's will having wound up the concerns, contains an elaborate recital of that will, in which however that of the son is recited. It may be admitted to be a confirmation of all the acts of the trustees, and a justification to them for having charged the estates with a considerable sum for his debts, which his other property was insufficient to answer; but it cannot be carried further so as to amount to a confirmation of the whole will. But where an instrument purports to confirm a particular transaction, or where a deed is given for a special purpose, every thing ulterior to that special purpose remains in equity unaffected by the deed, and is in trust for the party making it (a). Thus in *Innes v. Jackson* (b), where on a mortgage of the wife's estate a fine was levied which was declared to enure to the use of the mortgagee for a term of years, with remainder (after intermediate estates) to the use of the right heirs of the survivor of the husband and wife; but there was no recital of any intention to do more than make a mortgage, it was held that the equity of redemption remained in the wife. The letters of Mrs. *Ann Parker* are not more applicable to the case of a tenant for life than to that of a tenant in fee.

1818.  
DILLON  
v.  
PARKER.

*The MASTER of the ROLLS.* [After stating the prayer of the bill.] The claim of the plaintiff is confined to the estates

JUNE 2.

(a) On this point see *The Marquis Chalmersley v. Lord Clinton*, 3 Meric. 173, and the cases there

referred to.

(b) 16 Ves. 356.

which

1818.  
  
 DILLON  
 v.  
 PARKER.

which were originally settled by deeds dated the 1st and 2d of *October* 1741; and the plaintiff who desires of a Court of Equity to declare that he is entitled to those estates, and that they ought to be conveyed to him, is bound to make out a clear title, which he undertakes to do by his bill. For that purpose he begins with stating as the origin of his title, the settlement of 1741, by which the estates in question were settled upon *Sir Henry John Parker* for his life, with remainder to his son in tail male, with remainder to himself in fee. Under that settlement therefore, the estate did upon the event of the death of the son *John Parker* without issue, revert to and become the absolute property of his father *Sir Henry John Parker*, and the defendant claims under a will duly executed by the latter: consequently, unless *Sir Henry John Parker* has done any thing to prevent his right of disposition, the equitable estate would be, as the legal estate is already, complete under the settlement of 1741 and the subsequent will of *Sir Henry John Parker* devising it ultimately to the defendant *Sir William Parker* for life. But the plaintiff *Mr. Dillon* undertakes to prove that under the circumstances of the case, that will was invalid, and ought to have no effect in the disposal of the estate, which on the contrary ought to go as directed by the will of *John Parker* the son, whereby those under whom *Mr. Dillon* claims acquired an estate in fee; and that he, representing them, is entitled as heir or devisee to this estate, in opposition to the disposition made of it by the will of *Sir Henry John Parker*.

For the purpose of establishing that it is necessary for *Mr. Dillon* to make out two propositions; first, that *Sir Henry John Parker* relinquished his right of disposal over his own estate, and made his election to give it up on accepting the property given to him by his son; and secondly, that the daughters to whom the estate was devised for life by their father, and who were entitled to it in fee, did not make their election to stand by the will of the father, and in opposition

to that of the son. Both these propositions the plaintiff is to make out; and the question will be, whether he has established them satisfactorily, and so as to entitle himself to the declaration which he seeks.

1818.  
  
 DILLON  
 v.  
 PARKER.

Now, the course of proceeding to make out these propositions is this. In the first place it being admitted that during the joint lives of the father and the son, the settlement was, unless there was any agreement to alter it, the rule of title between these two parties, the son had no title to the estate in immediate right, unless he acquired it by some agreement with his father; and the plaintiff has in the first place endeavoured to make out, as stated in his bill, that such an agreement was entered into by *John Parker* the son, with his father *Sir Henry John Parker*, who appears to have been in embarrassed circumstances; and who it is stated did in consideration of the sum of 700*l.* paid to him, and of an annuity of 200*l.* agree to part with his interest in the estates. Evidence has been entered into for the purpose of proving that the son after he came of age in 1766, was actually in possession of the house at *Talton*, expended a considerable sum of money in repairs to the house in *Salisbury Court*, which formed another part of the settled estate, and that he also let this house to a person of the name of *Vincent* for 100*l.* a year, and did other acts which are insisted on as proving that he was in the possession of the settled estate during the life of his father. The actual proof of the payment of the 700*l.* is not given, nor is the agreement itself produced. It unfortunately happens that though it is admitted by both the plaintiff and the defendant that some agreement existed, neither party has been able either to produce the instrument itself, or to lay before the Court satisfactory evidence of its terms; one party stating that it was an absolute agreement by which the father gave up his interest to his son; the other, that it was subject to a condition that in the event of the father's surviving the son, the estate should  
 revert

1818.  
  
 DILLON  
 v.  
 PARKER.

revert back to the father. Whether the terms of the agreement were of the one kind or of the other, we are unable to discover, because on account of the length of time which elapsed between the transaction in question, and the commencement of the present suit, no satisfactory evidence on the subject can be adduced. I was of opinion that the evidence tendered on the part of the defendant for the purpose of proving the existence, the loss, and a correct copy of the agreement, was not sufficient. The Court is consequently under the necessity of considering the case without the light which might have been thrown on it from the agreement, knowing only that some agreement was made: and the plaintiff is obliged to proceed without any assistance from that agreement. Unless it was an agreement which affected not merely the life estate of the father, but his reversion in fee, it could not enable the son to make a disposition of it in as much as he would have only the life interest of the father in addition to his own estate tail, which would not have enabled him without any further act to dispose of the fee to his sisters; whereas if he had acquired the whole interest of the father, that would have been sufficient to enable him to dispose of the estate.

Under these circumstances therefore the first instrument proved in the progress of this title is the will of the son, which is dated the 2d of *August* 1769, and is followed by a codicil dated the 2d of *September* in the same year. By that will Mr. *John Parker* who had acquired a considerable property under the will of his grandfather *Page*, and had personal estate of his own, in the first place devised to his father for his life, all the estates that he had the power to devise; he then after making a disposition in favour of his two sisters of the whole blood, and on which no question arises, devised the Manor and Capital Messuage, called *Talton*, with the estate thereto belonging, the *Tredington Farm*, and other premises, comprising not only estates which he then possessed, but "all estates whatsoever and wheresoever, which descended

descended or came to him, or which should descend or come to him from his father." This is undoubtedly singular language to be used in the life-time of his father; but it is clear that the will was made under a doubt whether he would survive his father or not; for in the latter part of it he looks forward to a contingency; in one event appointing his father to be his executor, in the other, substituting other persons; and he seems to anticipate a descent from his father, which he appears to have considered would have rendered his disposition valid. In this manner he devised the estates to his two sisters *Margaret* and *Ann Parker*, who were his sisters of the half blood, in fee; and it is under this devise that *Mr. Dillon* contends they became entitled to these estates in fee, and that he, as representing them, has a right to insist that the fee was properly disposed of to them.

The son died in the month of *October* 1769; and supposing the estate to be included in the general devise to his father, (which however is somewhat doubtful), the father became entitled under the son's will, to what he had before, namely, a life estate in the *Talton* property. He also became entitled to a life interest in any other real estate of the son, and to the whole of his son's personal estate. By the codicil the son expressly devised to his father in fee the *Arnscoth* estate, which he had subsequently acquired; and he directed that a bond of 1000*l.* which the father owed to *Mr. Page*, should be given up, that there should be no prosecution by the sisters against the father, that if they proceeded to harass him they should forfeit all interest under the will; and in that event he gave the forfeited property to the father. Under these circumstances it is insisted by *Mr. Dillon*, that when the son died, the father ought to have been put to his election; because the son having taken upon himself to dispose of the settled estate which belonged to the father, and having actually given to the father real and personal property to a considerable amount, it was not competent to the father to take the benefit given him by the

1818.  
DILLON  
v.  
PARKER.



1818.

DILLON

v.  
PARKER.

the will of the son, and to frustrate and defeat the effect of that will.

Now, supposing that which is an undoubted principle and incapable of being shaken, that under such circumstances no person can take under a will and defeat it, and therefore that it was clearly a case in which Sir *Henry John Parker* might have been put to his election; the point which the plaintiff undertakes to make out, is not only that it was a case in which he ought to have been put to his election, but that he did actually make his election. Supposing that to relate to any intent of the father, or to any voluntary act of relinquishment of his own estate, as choosing to prefer the estate given him by his son, and to give up, as the price for that estate, his own property—supposing that to be the question which the term election seems to import—that he prefers one estate to the other as matter of choice; the question will be, whether in point of fact that is evidenced, and so generally evidenced as the plaintiff undertakes to make out when he expects the Court to act upon it. Undoubtedly, so far as it is a question of fact, there seems considerable difficulty in establishing that the father did make any such election—that he was in any respect apprised of the necessity of election—that he was cognizant he could not hold his own property, and take the property given him by his son—and that exercising any judgment which of the two was preferable, he did voluntarily and of choice abandon his own estate, and take that which was given by his son. That is a matter of fact which must be made out in order to establish the proposition of the plaintiff. It is not sufficient that the plaintiff should shew that the father proved the will of the son, and accepted all the property thereby given to him, if he also exercised dominion over his own estate as freely as if the son had made no disposition of it; if he did, the question would be, when a person uses both estates, retaining and claiming to retain and dispose of his own estate, and yet accepting and using the estate given

given him, whether as a matter of fact it could be pronounced that he had elected the one rather than the other. Is not the inference that he elects both? How can it be fairly said that he has relinquished as the price of the estate given him by his son, that estate over which he continues to exercise the same dominion as before? Now that he did in fact consider himself perfectly at liberty to dispose of his own estate notwithstanding the will of his son, and that for some reason of which at present we are ignorant, probably referring to some agreement or understanding between them, he did not consider the disposition of his son relative to the settled estates, as binding on him, but as being to take place in the event only of his son's surviving him, or that for some reason he was not bound to accede to that disposition, is quite evident; for in a very short time after the death of his son he actually executed his own, by which he made a full disposition of his own estate. By that disposition, which is very long and elaborate, he settles it upon his eldest daughter for life, with remainder to her issue, with very detailed and minute limitations, with remainders ultimately to other branches of the family at very considerable length, evidently not considering himself bound by the disposition his son had made of the estate to those two daughters *Margaret and Ann* in fee. So far from proving that he chose to give up the estate, it was an act insisting on his own right to dispose of it; and it is worthy of observation that this will is prepared by the same Solicitor and attested by the same witnesses as the will of his son; no one conceiving that the one instrument deprived him of the power of making the other. The whole will is made with great detail and care. Considering it as matter of evidence of intent, surely there is as strong evidence now before the Court that he insisted on abiding by his own estate, as that which is afforded on the other hand by the circumstances of his having accepted, enjoyed, and mortgaged the estate of his son, of his having proved his will, and having had the benefit of his personal property; but he chose to make

1818.

DILLON  
v.  
PARKER.

1818.

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DILLON  
v.  
PARKER.

make a free use of his own property at the same time. How then can the Court say, that he elected one and relinquished the other? The utmost that can be said is that he had no right to retain both, that he was therefore bound to make his election, and that his daughters might have put him to an election, insisting that he had no right to both. They did not however do any act of that kind. The property was enjoyed during the short interval which elapsed between the death of the son, and that of the father, which was about two years; in that interval the father did the acts I have stated, which are equivocal, and shew an intention as much to keep one as to accept the other.

The point made on the part of the plaintiff in this case is, that accepting of itself binds, and that it amounts to something in the nature of a forfeiture of the estate without reference to intent. It is said that he unequivocally accepted one, and by such acceptance gave up his own estate. But that is not election—it is forfeiture. If by accepting and taking one he is bound immediately to give up the other, though he may be ignorant of any obligation he was under to make his election, ignorant that it was not competent to him to retain both, if the consequence in law of the touching one is the instant relinquishment of the other, then undoubtedly a party may inadvertently by accepting a legacy or property of trifling value, incur a forfeiture of his own estate, not however by reason of his electing, but as a legal consequence operating on the act he has done. In all matters of election the Court has undoubtedly been anxious at the same time that it enforces the equitable principle that a person shall not hold both, still to give him an option to have the subject brought fairly under his consideration; and in many cases not to consider him bound by acts he may previously have done. In *Wake v. Wake (a)*, where a widow had for three years enjoyed a legacy under a will, and afterwards claimed her dower, it was

(a) 3 Bro. C. C. 255. 1 Ves. jun. 335.

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held, not that she had made her election, but that she ought to be put to her election. In all the cases of this description it has been determined, that before the party is put to his election the fund must be cleared, and he must know what he is about, and have the subject fairly stated to him, because the principle does not go the length of forfeiture, but only that he must be apprised that he cannot take both funds, and be required to elect which he will have. He may be put to his election; but the question as to what length of enjoyment, and what circumstances amount to proof of election, is matter of more difficulty. On this part of the case, I can only say, that if I am to determine a question of fact, I feel difficulty in stating that I am satisfied the father ever had an idea that he was making an election, or that it was not competent to him to keep his own estate. Whether the interval of two years which elapsed between his son's death and his own, and the acts done by him during that interval, would have bound him, supposing the daughters had called on him to make an election, or had insisted that he had made an election, is another, and a very different, question. It may be a question, whether after the death of the father, more could have been required by the daughters, than that those who represented him should make an election: on that point it has been decided, that in such a case if the party bound to elect could make compensation to the other party, and put him in the same situation as if the person bound to elect had not taken benefits under the instrument which raises the question of election, the representatives of the latter may renounce those benefits, making full compensation to the other party and putting him in the situation he would have been in, if the party who was bound to elect had not taken under the instrument by which the question was raised. Now, supposing the daughters had in 1771 insisted, that some person ought then to have made an election for the father, he not having made one himself, it would have been a question, whether it was not competent to those who represented the father to say, that they would

1818.  
DILLON  
v.  
PARKER.

1818.  
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 DILLON  
 v.  
 PARKER.

prefer the settled estate, relinquish the real and personal property which passed by the will of the son, and suffer the settled estate to go in the manner directed by the will of the father. This part of the case therefore is attended with very considerable difficulty; and unless the plaintiff can clearly make out something to give validity to the son's will, the latter had no power to dispose of any part of the settled estate, which at law was undoubtedly the estate of the father, and of which legal estate the plaintiff cannot call on the Court to divest the other party without making out a clear and undisputed title, by shewing first that the father did make his election; for if his representative is only now to be put to his election, the bill is not constituted for that purpose. He insists that the father did make his election. In that respect, there is, for the reasons I have already mentioned, very considerable difficulty. The second point however renders it unnecessary further to consider the first; for assuming that the father was bound to elect, and that he actually did make his election, it would remain to be considered whether by the same course of reasoning, every topic urged, and every argument and principle applied, to govern the first part of the case, and to determine that Sir *Henry John Parker* elected to take under the will of his son, do not apply with tenfold force to the conduct of the two daughters after the death of their father.

By the will of Sir *Henry John Parker*, dated the 10th of November 1769, it appears that he did in the first instance devise all the estates to which he was entitled, and all the settled estates, (including therefore the equity of redemption of the estate at *Arnscoth*,) and all the leasehold estate held under the Bishop, to *Parker* and *For*, and their heirs, to the use of his two daughters *Margaret* and *Ann*, in moieties, for life, with remainder to their issue, and with remainders over to other branches of the family. But in preference to all the persons claiming under those limitations, he limits a term of one thousand years to *Parker* and *For*, for the purpose of  
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raising by sale or mortgage a sufficient sum to pay his debts and legacies; and by his codicil he has anxiously and expressly provided that the monies to be raised under the term should go in exoneration of his personal estate, in order that it might go free and clear to his executrices *Margaret* and *Ann*, who are the chosen and primary objects of his bounty, both with respect to the real and personal estate. He gives them for life all his real estate, which he afterwards gives to their children in preference to all other persons; and he gives them absolutely all his personal estate, and appoints them residuary legatees and executrices. This Will therefore gives them very considerable benefits both real and personal, upon the death of their father. He died in *October 1771*; at that time therefore, if not before, the daughters were put to their election, for it is clear that they were entitled at that time, if ever, to the fee-simple of the settled estates under the will of their brother, and to an estate for life only in the same property under that of their father. If the will of the father was good, they were also entitled to his personal estate, and to a life estate in the *Arnscoth* property, and any other real estate which belonged to their father. It is difficult to suppose, that circumstanced as they were at that time, they would not have recourse to professional assistance for the purpose of being informed, whether it was for their benefit to elect to take the provisions made for them by the will of their father, or to adhere to the will of their brother. In point of fact it appears that they took the opinion of a very respectable Barrister, who advised them that they were bound to make their election. But without the aid of that circumstance, it is natural to suppose that they would be apprised that such was the situation in which they were placed. Then, which way do they elect? To become devisees for life under the will of their father, and take what is given by that will, or to be devisees in fee under the will of their brother, and abandon all their interest under that of their father, as they could not have both? Upon this point, every argument that is

1818.

*DILLON*  
v.  
*PARKER.*

1818.

DILLON

v.  
PARKER.

used to induce the Court to pronounce as a matter of fact, that the father evinced an intention to confirm the will of the son,—every argument that is used to prove election in the father, certainly proves it infinitely stronger on the part of the daughters with respect to his will; for it is made out on the part of the daughters not merely by proving that they took what was beneficial to them, and by inferring from that circumstance that they relinquished what was not for their benefit, but by shewing that they did expressly and unequivocally abandon their character of devisees in fee, and assume that of devisees for life. The father did nothing that manifested on his part any intent to renounce his own estate; it is only an inference from the circumstance of his taking the other: but here the daughters not only took what was given to them by the will of their father, but adopted it in the character, and according to the title, by which it was expressly given to them by the will of the father, and which is completely inconsistent with the will of the son, for they could not be both tenants for life and tenants in fee of one and the same estate; if therefore they did unequivocally declare themselves to be tenants for life, and impute their title to that estate to the will of their father, surely that is evidence to shew that they elected to take under the will of the father, to clothe themselves with the character given to them by that will, and consequently to abandon all the character given them by the will of the son.

This proposition is made out, not by obscure inferences from conduct, but by a series of express deeds under the hands and seals of these ladies, who were adult and perfectly competent. The first act done by them towards determining the question whether they were to be tenants for life under their father's will, or tenants in fee under that of their brother, was the execution by them of certain deeds, dated the 14th and 15th of *April* 1772. It was necessary to raise the sum of 1,100*l.* for the purpose of paying a fine to the Bishop of *Worcester*, on the renewal of the lease of that part of the estate which was leasehold, in consequence of the death of two  
of

of the *cestuique vies*, the estate being then held only on the life of the survivor who was a person named *Snow*. By the will of Sir *Henry John Parker*, one of the trusts of the term of one thousand years, was to raise the money necessary to pay the fines on renewals. But the plaintiff insists, and insists in the name and character of these two daughters, and as deriving his title through them, that this will of Sir *Henry John Parker*, containing the limitation of the term of one thousand years, was a nullity *quoad* the settled estates. But what is the first act to shew that *Margaret* and *Ann Parker* considered it a nullity, and as making no settlement of the estates? The first act is, that they execute the deeds of the 14th and 15th of *April 1772*, in which they begin by describing themselves as "daughters and devisees for life" "under their father's will." They procure the trustees for the term of one thousand years to join in the deed, and those trustees are stated to be "trustees named in the will of "Sir *Henry John Parker*." They here assume the character of devisees for life, which indeed they more expressly state in another deed to which I shall presently refer. They recognize the will of the father, an instrument which Mr. *Dillon* contends, they insisted was invalid. To what end should they recognize Mr. *Parker* and Mr. *Fox*, as being trustees of the term, if their title to the term was merely under a void instrument? It might however be said, that these ladies concurred in the mortgage merely for the purpose of raising money, not intending to abandon their right, but that subject to the security for the money, the ultimate right was to belong to them. If so, they alone would be the persons to whom the equity of redemption would be reserved; but on the contrary by this mortgage, the right to redeem is reserved to them, "or the persons entitled under the will "of Sir *Henry John Parker*." This is not therefore merely letting in a charge upon their own estate, but an acknowledgment that the right of redemption was to be in the persons entitled under that will, which it is said they contended

1818.  
DILLON  
v.  
PARKER.



1818.  
  
 DILLON  
 v.  
 PARKER.

was absolutely null and void. It is impossible to reconcile this with the argument that the reversion or the right to redeem belonged absolutely to these daughters, and could not after them belong to any person claiming under the will of Sir *Henry John Parker*. The deed also contains an agreement that as long as they pay the interest upon the mortgage, and until default, "the persons entitled under the will and codicil "of Sir *Henry John Parker*" should quietly enjoy. Here again is a recognition of the validity of the will, and a declaration that it is to be the sole rule to govern the disposition of this property. This is a deed under the hands and seals of these ladies executed in the year immediately following the death of their father; and it is impossible to say that it is not a strong manifestation of their intention to adopt the character of devisees for life, and to let in all the dispositions their father had made of this estate. If they chose to do so, the question is not whether it was or was not for their interest to do it: for Mr. *Dillon* claiming under them as a volunteer must be bound by their act, and if they voluntarily chose to prefer the father's will to the son's, Mr. *Dillon* cannot undo what they voluntarily chose to do.

The next deeds are dated the 21st and 22d of *May* 1778, in which it is recited that Sir *Henry John Parker* had mortgaged the *Arnscott* estate given to him by the codicil of his son. The equity of redemption was given by their father to these ladies for life. This they took clearly under the will of the father, for it was property to which they had not the least right, except under his will. They had therefore nothing to do with the *Arnscott* estate except as devisees for life. Here then was a manifest assumption of a property to which they had no title, if they meant not to take under the father's will. By this deed, to which *Margaret* and *Ann Parker* were parties, the *Arnscott* estate was conveyed to a person of the name of *Jordan*, who paid off the whole principal and interest due on the mortgage, and an additional sum of 400*l.* and upwards, making a total of about 1,350*l.*

as the price of this estate, which was conveyed to *Jordan*, and the term of one thousand years, assigned for his benefit, in consideration of his paying this sum of 1,350*l.* This is quite unequivocal to shew that *Margaret* and *Ann Parker* did elect to take that estate, and to take it as devisees for life, they are described as such in various parts of the conveyance in fee, and of the assignment of the term, they join in the conveyance, and by a separate deed *Parker* and *For*, the trustees of the term, do by their direction assign it for the benefit of *Jordan*, the purchaser. It is material also to state for what purpose this money was raised. After payment of the mortgage there remained out of the purchase-money a balance of 400*l.* 15*s.* 3*d.*, which, added to a sum of 2,980*l.* raised under the next deed which I shall mention, formed a total of 3,380*l.* 15*s.* 3*d.*, which was applied in payment of the debts and legacies of *Sir Henry John Parker*. It has been contended that the father left no personal property, and that therefore the daughters could not take any under the will, but that proposition does not seem to be well founded, for it distinctly appears that this 3,380*l.* 15*s.* 3*d.* constituted all the debts of the father, excepting one solitary debt of 5*l.* 6*s.* which was outstanding, and which sum was actually paid to the executrixes, to be applied in payment of that debt, when the person entitled to it should appear. It is quite evident therefore that all the debts and legacies of *Sir Henry John Parker* were actually paid, as he meant they should be, by mortgaging or selling his real, in exoneration of his personal estate, that the latter might go clear to his executrixes. If therefore there was any personal property, the debts, legacies, funeral expences, and expences of the trust, were all paid aliunde by this sum of 3,380*l.* 15*s.* 3*d.*, and the personal estate, whatever it might be, went entire to the executrixes and residuary legatees.

The next instrument is a deed dated the 22*d* of *March* 1774, by which this sum of 2,980*l.* was raised by a mortgage for a term of nine hundred and ninety-five years, the equity  
of

1818.  
DILLON  
v.  
PARKER.

1818.  
  
 DILLON  
 v.  
 PARKER.

4

of redemption being reserved in the same manner as on the former occasion. The deed states that the trustees had proceeded in further execution of the will at the special instance of *Margaret* and *Ann*; that they had raised these sums of 400*l.* 15*s.* 3*d.* and 2,980*l.*, and with the full approbation of these ladies, the trustees apply the whole of this money to the exoneration of the personal estate of *Sir Henry John Parker*, the parties evidently treating the settled estates as having passed by his will, and as not being affected by the will of his son. Here then are repeated deeds, not one of which is explicable on the supposition of the will of the father being void, but all which on the contrary are referrible to an intention to consider it as an instrument by which they chose to abide. This mortgage, after an intermediate assignment, was ultimately transferred to *Dr. Kenrick* in trust for *Mrs. Ann Parker* herself, who recognized in the strongest possible way the validity of that mortgage, which had been made by means of the term created by her father's will. On the 16th of *April* 1798, at a period of twenty-seven years after the death of their father, another deed is executed, stating that *Margaret* and *Ann Parker*, "as devisees for life," had paid out of the rents and profits all the interest upon the mortgage. The mortgage was then assigned to the Reverend *John Lucy*, by whom the principal was paid; *Mrs. Ann Parker* is a party to the deed, and thereby confirms the estate to *Mr. Lucy*. In addition to this, a deed was executed by *Margaret* and *Ann Parker*, dated the 21st of *April* 1777, in which they were also described as "devisees for life of the estates devised by the last will and testament of *Sir Henry John Parker*," That was a deed of indemnity, recognizing and confirming all the antecedent deeds, and recognizing the validity of all the acts which had been done in furtherance and execution of the will of their father. It was executed by all the parties for the express purpose of preventing disputes, reciting that they were unwilling to go to the expence of a suit in Chancery to carry the will into execution.

1818.

DILLON  
v.  
PARKER.

cation. It cannot be doubted that they thereby acknowledge that if a suit had been instituted, they would have concurred in giving validity to all the acts done under the will of Sir Henry John Parker. It has been contended that all this was merely confirmation, and that according to the case of *Farewell v. Coker* (a), it might amount to no more than a partial recognition, and that subject to a confirmation of the particular transactions referred to, the daughters might still be entitled to an estate in fee under the will of their brother. But in *Farewell v. Coker* the party had released, and an issue was directed to try whether the party was cognizant, that she had a reversion in fee in the lands in question; and secondly, whether she intended to pass and convey that reversion. Assuming that case to have been rightly decided, how does it apply to the present? It is evident that these ladies were cognizant of their rights, for they repeatedly described themselves as devisees for life under the will of their father, and it is equally clear that they knew of the will of their brother giving them an estate in fee. Can there be any doubt that they had availed themselves of professional advice on the subject? They were clearly cognizant of both their rights. The deeds therefore were not executed in ignorance; and they unequivocally shew that these ladies did elect to stand by the will of the father, and to relinquish any rights inconsistent with that will. *Margaret Parker*, the elder of these ladies, died in 1785, having by her will devised to her sister in fee all her property, and mentioning one half of the *Hatch* estate devised to her by her brother, which shews that she was aware of her brother's will: and in 1811 Mrs. *Ann Parker*, the survivor, by her will devises the *Talton* estate in fee to Sir *Harry Parker*, the same person who would have been entitled to it for life under her father's will. Sir *Harry Parker* died in her life-time, and the plaintiff, if he succeeds, would be entitled as her heir at law, and not by

(a) Stated by Sir William Grant, 3 Meriv. 353.

1818.

DILLON

v.

PARKER.

any intention on the part of the testatrix, for she meant that estate to go as her father had directed, and Mr. Dillon to take only the house in *Salisbury Court*, and the legacies given to him and his sister. These are acts which might be said to shew an intent to stand by the will of the son; but it is to be considered whether, after having during so long a period of time, and by so many acts, recognized that they were merely devisees for life, it was competent to the survivor in the year 1811, to assume a different character, and dispose of the estate as though it had passed by the will of the son. Surely if the father could not in the next month after his son's death make a disposition contrary to the will of the son, it could not be competent to *Ann Parker*, after having for the period of forty years acted under the will of her father, to elect to act under the will of the son, and to dispose of this estate as one which was in her own power.

Several letters written by Mrs. *Ann Parker* to Sir *Harry Parker*, the defendant's father, have been given in evidence. The language of one of these letters, dated the 10th of *March* 1800, shews that she had applied part of her own money in paying fines on the renewal of the lease for lives, and she complains of the expence which they cast on her, but claims some merit for not having recourse to the means provided by her father's will for raising money for that purpose, alluding undoubtedly to the term of one thousand years:—"Pray tell my friend *William* that I beg he will take care of himself, as I mean to put his life in the estate, as being the most material one. I think he has always been healthy, but God knows life is very uncertain at all ages. The Bishop's secretary has been written to, to prepare the lease with Mr. *Parker's* life in it as speedily as possible, for fear of accidents, as I much wish to do what is right and just by my successor. Should the fine be called for before the transfer is made on the 6th of *April*, I will avail myself of your indulgence, and draw upon you for 160*l*. I shall be much obliged to you, when the brokers bring you the money, to pay them  
" every

" every expence attending this business, and should there not  
 " be enough for that purpose be so good to repay yourself  
 " out of the next dividend you receive for me on the Bank  
 " Stock, which I must trouble you to do before you leave  
 " town for the summer, and remit it here to me instead of  
 " paying it to my bankers; for this same fine, *as I do not tax*  
 " *the estate by raising the money*, will be a pull upon me,  
 " and I shall want the dividend by the time it becomes due.  
 " 800*l.* is a great deal to pay in a year and a half, for no  
 " longer was poor *Garstin's* life put in: 300*l.* of that sum  
 " I have borrowed upon bond, the rest I have paid myself.  
 " My successors will I hope allow I have been a good  
 " steward, *as money was allowed to be raised upon the estate*  
 " *for the renewal of lives.*" But money was no otherwise  
 allowed to be raised for the renewal of lives than by the will  
 of *Sir Henry John Parker* creating a fund for the very pur-  
 pose. It is therefore clear that this lady, in the year 1800,  
 expressly recognized the will of her father, and took merit to  
 herself for not having recourse to the mode which that will  
 afforded her of raising money for renewals. In another letter  
 of the 8th of September 1806, she says, " I am unlucky, for  
 " there is another life dropped in the *Tredington* estate with-  
 " in seven years, which I have renewed (that is two, and mean  
 " to put in a third) without encumbering the estate; which,  
 " as times now are, will be a great pull upon me."—" I shall  
 " take your recommendation of putting in *Mr. Hyde Parker's*  
 " life, twenty-one is a good age; you will then have the lives  
 " of two of your sons in, and I hope they will live to a good  
 " old age." This letter was addressed to *Sir Harry Parker*,  
 who was the person next in remainder if she died without  
 issue. The letter proceeds thus; " Having raised 1,200*l.* in  
 " a very short time" (meaning 1,200*l.* which she had volun-  
 tarily paid towards these fines instead of having recourse to  
 the estate), " in regard to myself it is of little consequence,  
 " being far down in the vale of years; but I would by no  
 " means have my successors injured, therefore I shall be  
 " entirely

1818.  
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 DILLON  
 v.  
 PARKER.

1818.  
 ~~~~~  
 DILLON  
 v.  
 PARKER.

" entirely guided by your advice, which I beg you will candidly give me. Lifehold estates eat themselves up, for I shall have paid, when this life is renewed, 1,900*l.* within eight years."

This is the evidence upon which it appears to me that at least it is not clear that these ladies did not make an election to take under the father's will, the second proposition which it was incumbent on the plaintiff to make out before his own title could be clear, for he would be bound by the election of *Margaret and Ann Parker* if they made any election, and therefore bound to abide by the will of *Sir Henry John Parker*, if they under the circumstances chose to abide by it. Upon this part of the case, I am of opinion upon examining the whole evidence on both sides, that the plaintiff has not satisfactorily made out a case to call upon the Court for the declaration prayed by his bill, that this estate is his. The right, if it exists at all, existed more than forty years ago in *Margaret and Ann Parker*. It is enough to say, that the legal estate is in the defendant, agreeably to the settlement which is the undoubted origin of this title. The plaintiff insists upon invalidating the title by setting up a right of disposition in a person who had no power to make it, and who could only acquire it by the means I have stated, and which are not clearly made out to my satisfaction. The consequence is, that all that part of the bill must be dismissed. With respect to the supplemental bill which has put the defendant to make his election, either to abide by the will of *Mrs. Ann Parker*, of which he is the executor, and permit the house in *Salisbury Court* to go to *Mr. Dillon* as she intended, or to give up the legacy of 500*l.*, I think *Mr. Dillon* is entitled to call on the defendant to make that election, and to state which of the two he will have (a).

(a) After his Honour had concluded his judgment, he referred to *Cookes v. Hellier*, 1 *Ves.* 234.

" Bills dismissed, except so much of the supplemental bill  
 " as prays, that the defendant may elect whether he will take  
 " under or against the will of *Ann Parker*; and the defend-  
 " ant by his counsel having thereupon elected to take against  
 " the will of *Ann Parker* the premises in *Salisbury Court*,  
 " his Honour doth declare, that the defendant is bound to  
 " relinquish the legacy of 500*l.* by the said will given to him,  
 " and that he is bound to account for the personal estate of  
 " the testatrix, without retaining the same, and the defendant  
 " to be let into possession of the house in *Salisbury Court*."

1818.  
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 DILLON  
 v.  
 PARKER.

*Ex parte* the Bank of ENGLAND, in the Matter of  
 STEPHENS, a Bankrupt.

January 16.

THIS was a petition presented by the Bank of *England*,  
 in the Matter of *Richard Stephens* a bankrupt, stating  
 that the bankrupt was indebted to the petitioners in 8,200*l.*  
 and upwards, and that *John Sparkes Cox*, a clerk of the  
 Bank, being authorised by letter of attorney under their cor-  
 porate seal, to prove debts due to them under commissions  
 of bankrupt, attended before the Commissioners to prove  
 the debt under the commission, and to vote in the  
 choice of assignees by virtue of a special letter of attorney  
 under their corporate seal: that an objection having been  
 made, that the debt should be proved by one of the corpora-  
 tion and not by a clerk, the Commissioners refused to receive  
 the proof by *Cox*, conceiving that the Bank was not autho-  
 rised to prove debts under commissions of bankrupt by a  
 clerk, without having obtained from the Lord Chancellor,  
 either a general order for that purpose, or a particular order  
 for the proof of the individual debt. The petition therefore  
 prayed that the Commissioners might be ordered to receive  
 the deposition of *Cox*, in proof of the petitioners debt, and  
 that in order to prevent a repetition of such objections, it  
 might

A person au-  
 thorised by the  
 Bank of Eng-  
 land, by a ge-  
 neral power of  
 attorney may  
 prove a debt  
 due to them  
 under a com-  
 mission of  
 bankrupt;  
 and a person  
 authorised by  
 them by a spe-  
 cial power of  
 attorney for  
 that purpose,  
 may vote for  
 them in the  
 choice of as-  
 signees.



1818.

*Ex parte*  
The Bank of  
England.

might be declared that the petitioners are in all cases entitled to prove debts under commissions of bankrupt by any of their officers or clerks duly authorised by them for that purpose, and that the petitioners are entitled by any of their officers or clerks, or by an agent under a special power of attorney under their corporate seal, in each bankruptcy, to vote in the choice of assignees; evidence being produced to the Commissioners, by affidavit, or by the *visá voce* examination of a witness, that the seal annexed to such powers of attorney respectively is the corporate seal of the petitioners; and that the petitioners might, by the said J. S. Cox, be at liberty to vote in the choice of assignees under the commission against *Stephens*, by virtue of the special power of attorney to him for that purpose.

*The LORD CHANCELLOR* made the following order:—I do declare that the petitioners, the Governors and Company of the Bank of *England*, are by law entitled, by any of their clerks or agents competent and duly authorised for that purpose, to prove under any commission of bankrupt any debt or debts which may be due to the said Governor and Company from the bankrupt or bankrupts against whom such commission has been or shall be issued; and also that the said Governor and Company are entitled by law to authorise and empower any person by letter of attorney under their corporate seal, in each separate bankruptcy, to vote in the choice of an assignee or assignees under any such commission of bankrupt as aforesaid, against any person or persons under which commission the said Governor and Company shall prove any debt or debts; and that the person or persons so to be authorised as aforesaid by the said Governor and Company, to vote in the choice of assignees, ought to be permitted to vote in such choice accordingly, upon producing to the major part of the Commissioners named in any such commission, a special power of attorney for that purpose, under the corporate seal of the said Governor and Company, and proving the same

came to be sealed with such corporate seal, by affidavit, or *vivâ voce* before such Commissioners: and I do order that the Commissioners named in the said commission against the said *Richard Stephens*, or the major part of them, do receive the proof of the said debt of 8,200*l.* 12*s.* 6*d.* in the said petition mentioned as a debt under the said commission by the said *John Sparkes Cox*, clerk of the petitioners, without the production to the said Commissioners of the authority from the said petitioners to the said *John Sparkes Cox*, to prove the said debt: and I do further order that the said *John Sparkes Cox* be permitted to vote in the choice of assignees under the said commission, against the said *Richard Stephens*, on behalf of the petitioners, upon his producing to the said Commissioners, or the major part of them, a special letter of attorney, under the corporate seal of the said petitioners, authorising him to vote in such choice of assignees, on their behalf, and proving before the said Commissioners by affidavit or *vivâ voce* the seal to such letter of attorney to be the corporate seal of the said petitioners.—  
[*Orders in Bankruptcy*, 1817-18, 144, fol. 106.]

1818.

*Ex parte*  
The Bank of  
ENGLAND.

JACKSON v. SEDGWICK.

April 16.

**B**Y articles of copartnership, dated 29th of May 1809, between *Richard Cookes* deceased, and the plaintiffs *Jackson* and *John Milthorpe Maude*, after reciting that *Cookes* and *Jackson* had for several years previous, and up to the 1st July then last, carried on the business of ship agents, ship brokers, and insurance brokers, in partnership,

Where articles of partnership contained a clause providing for the settlement of the partnership accounts annually on a certain day, and that on the

death of a partner his share should be taken and paid for by the survivors, according to the account next before his death, but the parties had for several years omitted to settle the accounts annually, and had engaged in adventures rendering it difficult that they should do so: held that the clause relative to the annual settlement of accounts was to be considered as waived, and that a deceased partner's share was liable to losses happening after his death, or adventures previously existing and unclosed; and an injunction was granted against proceeding at law against the surviving partners, on a bond given to the executors of the deceased partner before the accounts were taken.

which

1818.

JACKSON  
v.  
SEBOWICK.

which partnership it had been agreed between the parties prior to the 1st of *July* last, should be dissolved, and that *Cookes, Jackson, and Maude*, should enter into partnership in the business of ship agents, ship brokers, and insurance brokers, for seven years, to be computed from the 1st of *July* then last past, and that their capital should be 10,000*l.*, 6,000*l.* of which was to be brought in by *Cookes*, and 2,000*l.* by each of the other parties, and that the share of *Cookes* and *Jackson* in certain ships should be valued, and be considered as forming part of the capital, and be duly vested in *Cookes, Jackson, and Maude*; reciting also that the shares of the ships had been valued at different sums amounting together to 1,140*l.*, which was to be considered as so much capital brought into the joint trade by *Cookes* and *Jackson*, in part of the sums they were respectively to bring in, and which should bear interest from the 1st of *July* then last, It was witnessed that the parties to the articles covenanted with each other that they would be copartners together in the business of ship agents, ship brokers, and insurance brokers, and in all things incident thereto, and in all such other business as they should agree upon, for the term of seven years, to be computed from the 1st of *July* then last; that the stock or capital of the copartnership should consist of 10,000*l.* which should continue in the same during the whole continuance thereof, unless *Cookes* should happen to die before the expiration, in which case 4,000*l.* was to be repaid to his executors or administrators, in the manner afterwards provided for; and that as *Cookes* had brought in, and should continue in the copartnership during the whole continuance thereof, or so long as he should be living, 4,000*l.* being part of the 6,000*l.* above mentioned, over and above the proportions which *Jackson* and *Maude* had brought in, it was agreed that the joint stock, profits and effects should be liable to the repayment thereof, and in case the same should be deficient, the other parties should make good a proportion thereof.

The

The articles contained a provision, that all losses which should arise by reason of bad debts, fire, or other accidents, and all expences which should be occasioned to the copartnership, should be borne and defrayed as follows; 50*l.* annually by *Cookes*, out of his separate estate, and the residue out of the gains and profits of the trade, or by the partners in the following proportions; three-eighths by *Cookes*, three-eighths by *Jackson*, and the remaining two-eighths by *Maude*.

It was further provided, that the parties should, on the 31st of *December* in every year, or as soon after as possible, make up and pass an account in writing of all their dealings and transactions, and make a settlement or balance thereof, so that the true state of the same might appear, and of the profits of the said joint trade, and how much was coming to each of the partners; and that the amount of each partner's share of the gains and profits of the business should be carried to the separate account of the parties respectively in the partnership books, and such shares respectively should then be at the disposal of the party to whom the same should belong, and might be drawn out of the trade by the parties when they should please; and that each of the parties should be entitled to receive interest upon the amount of his capital in the business before any division of the profits, and that the same should be written in the several books, each of which should be subscribed by all the parties; and that such accounts, so passed and subscribed, should not be opened or called in question, but should be binding on all parties, their executors and administrators, unless some special error to the amount of 30*l.* or upwards should appear plainly to have escaped their notice, and should be discovered three years from the making up of such accounts: and that in case either of the parties should refuse to attend to take such accounts, and sign the same, for ten days after being required, it should be lawful for the other or others of them to proceed to take such account, and to sign the same, and to call to his or their

1818.  
JACKSON  
v.  
SEDGWICK.

1818.

JACKSON  
v.  
SERGEWICK.

assistance such other ship agent, ship broker, or policy or insurance broker, as he or they might choose; and such accounts, if taken and signed by the other parties within thirty days next after the expiration of such ten days after such default, should be final and binding, and not be opened or unravelled by the partner or partners making such default, but be considered conclusive against him or them, provided a copy of such account be delivered to the same party or parties, or left with them or him within thirty days, accompanied with an affidavit sworn before a Master in Chancery, that to the best of the knowledge and belief of the party or parties so signing such accounts, they were just and true accounts between the parties.

It was further provided by the articles, that no right of survivorship should be had or taken by any of the parties in case of death; and that if *Cookes* or *Jackson* should die during the continuance of the partnership, the executors or administrators of such of them as should so die should be entitled to an allowance from the survivors, or from *Maude* alone in case of both their deaths, during the remainder of the partnership term of seven years, of the annual sum of 400*l.*; such allowance to be secured to be paid in manner afterwards directed with respect to a deceased partner's share of the stock and profits.

The articles further declared, that in case any of the parties should die within the partnership term, his executors or administrators should be entitled to receive from the survivors an allowance in lieu of all profits from the day of the then last actual rest up to the day of such decease, in proportion to the amount of the profits which the party dying should have received, or have been entitled to receive, from the profits of the trade from the day of the commencement of the partnership up to the then last rest, in case two full years should not have elapsed from the commencement of the partnership; but in case two years should have elapsed prior to such last rest, then in proportion to the profits accruing in  
respect

respect of such two years immediately preceding such last rest; and that such allowance should be paid within six months to the respective executors or administrators of *Cookes* and *Jackson*, or such of them as should die within the term aforesaid, and should also be secured to be paid in the manner therein directed with respect to the share of a party dying during the copartnership, in the joint stock and effects.

The articles further declared, that upon the death of any of the parties during the partnership, his share in the joint stock, profits, and effects, up to the 31st of *December* immediately preceding his decease, or the value thereof should be paid or secured to his executors or administrators in manner following; one-third part of 2,000*l.* part thereof, with interest at 5*l. per cent. per annum*, to be computed from the expiration or completion of the partnership term of seven years; at the end of six months; one other third part, with such interest as aforesaid, at the end of twelve months; and the remaining one-third part thereof, with such interest as aforesaid, at the end of eighteen months, next ensuing the expiration or completion of the partnership term of seven years; and the surviving party or parties should be entitled to retain the same in business until such respective times, upon giving such security as after mentioned: And as to all such sums of money, estate and effects, as should belong to and be the share of such deceased partner, over and above the said 2,000*l.* and particularly as to 4,000*l.* which *Cookes* had brought in more than *Jackson* and *Maude*, the same respectively should be paid to the executors or administrators of such deceased partner or partners, in manner following; one third part thereof, with interest from the day of the death of such deceased partner, at the expiration of six months; another third, with interest as aforesaid, at the expiration of twelve months; and the other third part thereof, with interest as aforesaid, at the expiration of eighteen months from the decease of such deceased partner; and that the same should be secured to be paid in the same manner as the

1818.  
JACKSON  
v.  
SEBASTIAN.

1818.

JACKSON  
v.  
SADGWICK.

2,000*l.* and interest, and the annual allowance were secured to be paid.

The articles further provided, that on the decease of any of the partners during the partnership, the last rest or balance of account, signed by such deceased partner and the survivor or survivors, should be referred to, and what should then appear to have been the amount of the capital of such deceased partner at such last rest, should be considered as his capital at such last rest, and should not under any pretence whatever be canvassed, disputed, or called in question; and further, that in case any of the partners should die during the partnership, and upon or after such decease his representatives should become entitled under the provisions before contained to the payment of his share in the capital stock and profits, and to the payment of such annual allowance, it was agreed that for securing the payment of so much money as the full value or share of such deceased partner would amount to in such capital stock and profits, at the time therein mentioned and provided for payment thereof, with interest as aforesaid, and also for securing payment of the annual sum therein agreed to be allowed to the executors or administrators of the party so dying, the surviving partner or partners should, within one month after the decease of the deceased partner, with one other sufficient surety, become bound to the executors or administrators of the party dying, in one or more bonds, with double penalty, conditioned for payment to such executors or administrators, of such monies, or interests and allowances, at the times therein mentioned; and that the surviving partner or partners should thereupon become bound unto the executors or administrators of the partner so dying, in one or more bonds of sufficient penalty for indemnifying the executors or administrators of the partner so dying, and their or his lands and tenements, goods and chattels, from all debts and duties which at the time of his decease were jointly owing by the partners, to any person or persons, for any matter or thing touching

touching or on account of the joint business and partnership, and from all actions, suits, and expences, for or about the same debts and duties, which debts and duties the surviving partners did agree to pay and satisfy in good and convenient time : And that the executors or administrators of the party so dying, upon the execution of such bond as aforesaid, should assign and release unto the surviving partner or partners, all the share and interest of such executors or administrators, in all the estate and effects (other than such debts as were next thereafter mentioned) gains and profits of the partnership, which at the time of his death were due and did belong to the parties upon account of the said business : And it was further provided, that in case any of the parties should die during the partnership, then all such bad and desperate debts, owing to or on account of the business, as should not have been deemed and accounted as a good estate, and as such cast up and included in the yearly account to be made up and stated as aforesaid (if any such account or accounts should have been stated) should with all convenient speed be divided between the surviving partner or partners and the executors or administrators of the deceased partner, in proportion to their respective shares in the clear profits of the joint business, and thereupon the surviving partner or partners, and the executors and administrators of the deceased partner should give unto each other, and his and their executors and administrators, full power to sue for and receive their respective shares of such bad debts.

1818.  
JACKSON  
v.  
SEDGWICK.

The partnership was carried on by the parties to the articles till the 10th of *January* 1815, when *Cookes* died. At his death the partnership books were much in arrear ; no accounts had ever been signed by the parties as provided by the articles, although for some of the years sketches or drafts of such accounts had been made out, but not till a considerable time after the end of the years to which they referred. For the years 1813 and 1814, neither any accounts nor sketches



1818.  
  
 JACKSON  
 v.  
 SEDGWICK.

sketches of accounts had been made out. On the 27th *July* 1815, *Jackson* and *J. M. Maude*, together with *Edmund Maude*, as their surety, executed a bond to the executors of *Cookes*, in the penalty of 10,000*l.* with a condition reciting the articles and the death of *Cookes*, and that *Jackson* and *J. M. Maude* had paid to the executors the proportions of the allowance of the annual sum of 400*l.* mentioned in the articles, and had also paid to them at or before the execution of the bond 1,333*l.* 6*s.* 8*d.* being one-third part of the 4,000*l.* with interest from the death of *Cookes*, pursuant to the articles, but that no other payment had been made to them; that the partnership term of seven years expired on the 1st of *July* then instant, and that the accounts of the partnership were not made up and passed upon or after the 31st of *December* in each year, as agreed by the articles, so that the true state of the same, and of the profits, and how much was coming to the representatives of *Cookes*, did not at that time appear, but that it had been agreed that the plaintiffs should in the mean time execute the bond with the condition after mentioned; it was declared that if the plaintiffs should pay to the defendants the sum of money afterwards mentioned at the times afterwards expressed, viz. 666*l.* 13*s.* 4*d.* being one-third part of the said sum of 2,000*l.* with interest at five *per cent.* to be computed from the 1st of *July* then instant, on the 1st of *January* 1816; 666*l.* 13*s.* 4*d.* with interest after the same rate, on the 1st of *July* 1816; 666*l.* 13*s.* 4*d.* with interest at the same rate, and to be computed as before mentioned, on the 1st of *January* 1817; 1,333*l.* 6*s.* 8*d.* another third-part of the said sum of 4,000*l.* with interest at the same rate to be computed from the 10th of *January* then last, on the 10th of *January* 1816, and the further sum of 1,333*l.* 6*s.* 8*d.* with interest at the rate aforesaid, from the 10th of *January* then last, on the 10th of *July* 1816; and also if *Jackson* and *Maude* should pay to the defendants at the time and in manner stipulated in the articles, and with interest as therein mentioned, all such

sums

sums as should belong to and be the share of *Cookes*, above the two sums of 2,000*l.* and 4,000*l.* of and in the joint capital stock, and effects, and profits of the trade or otherwise howsoever, under or by virtue of all or any of the stipulations contained in the articles, and not exceeding, together with the 1333*l.* 6*s.* 8*d.* before particularly mentioned, the sum of 10,000*l.* for the purpose of ascertaining the stamp duty, the bond should be void. And in case upon settling the accounts of the said partnership it should be found that the representatives of the said *Richard Cookes* were not entitled to receive so much money as the whole of the said sums of 2,000*l.* and 4,000*l.* a proportionable abatement should be made from the last of the payments thereby conditioned to be made.

It appeared that several sums amounting to upwards of 3,400*l.* had been paid by the surviving partners to the executors of *Cookes*, on account of the bond : and that previous to the 31st of *December* 1814, various shipments of goods and other adventures which the partnership had entered into were depending and unclosed, the results of which were unascertained, but which it was then highly probable would be attended with losses, and that in some instances losses had since actually taken place.

The bill was filed by the surviving partners and their surety in the bond, against the executors of *Cookes*, insisting that the balance of profit and loss on the copartnership concern up to the 31st of *December* 1814, ought to be ascertained, by consulting the result of all engagements in business, in which the firm was then embarked, and for which the firm was responsible ; that the monies which the defendants were entitled to receive from the plaintiffs, in respect of *Cookes'* share in the copartnership business, at the time of the execution of the bond did not exceed 3,000*l.* being less than the money which the plaintiffs had paid to them ; that the before-mentioned losses having arisen from engagements entered into *bonâ fide* by the firm before the 31st of *December* 1814, ought

to

1818.  
JACKSON  
v.  
SEDGWICK.

1818,  
  
 JACKSON  
 v.  
 SEDGWICK.

to be brought into the partnership account, and the loss borne by the firm, inasmuch as it could not be known on the 31st of *December* 1814, what would have been the result of such engagements, although it was evident that in many of them heavy losses would be sustained.

The bill then prayed an account of the partnership dealings,—that the share of *Cookes* at the time of his death might be ascertained,—an account of all sums paid by the plaintiffs in respect of the share of *Cookes*,—that the defendants might pay to the plaintiffs what they should appear to have been over paid;—that the bond might be delivered upon the defendants being paid what should appear due to them;—and an injunction against proceeding at law on the bond.

The defendants by their answer, insisted that according to the true construction of the articles, the accounts should be settled on or down to the 31st of *December* 1814, according to the state of the partnership transactions on that day, and that such accounts when so adjusted should be binding and conclusive on all parties, unless an accidental error to the amount of 30*l.* or upwards, should be discovered therein; and that no subsequent transactions whether of profit or loss should be brought into the account, or any subsequent losses or profits of the then depending adventures should be brought into the account either to the debit or credit of *Cookes*, or of any partner who should die before the expiration of the term: and that they ought not to bear any part in any losses sustained by bankruptcies, which had happened since the death of *Cookes*, of persons indebted to the partnership, who at his death were believed to be solvent.

A motion was now made on the part of the plaintiffs for an injunction to restrain an action at law brought by the defendants on the bond.

Mr. *Hart*, Mr. *Bell*, and Mr. *Collinson*, in support of the motion, contended, that the parties having deviated from the  
 mode

mode prescribed by the articles for settling the accounts, that part of the articles was in effect put an end to, and the accounts must be taken as in ordinary cases, where there is no stipulation on the subject. Indeed, the clause itself if literally construed imports, not that the accounts to be annually taken must specify all the transactions in which the partnership should be engaged, but that such items only were to be extracted as would shew the profits, and that such profits should be carried to the account of each partner; but unliquidated transactions could not be included in the statement,

1818,  
JACKSON  
v.  
SEDGWICK.

Sir Samuel Romilly and Mr. Roupell, contra, contended, that the accounts having been agreed to be annually taken, the Court would consider the parties to be as much bound as if they had been actually taken pursuant to the agreement. If they had been made up in the mode and at the time stipulated, no subsequent events could have been brought in. It was impossible from the extensive nature of the business that the accounts could be closed at the exact times provided by the articles.

**The LORD CHANCELLOR.** This deed does not contemplate that the parties should be exporters of goods, nor any thing but ship agents and ship brokers. The question is, whether their omission to settle the accounts *de anno in annum*, is not evidence of their waiving the agreement on that subject, and whether the circumstance of their entering into dealings of this sort, is not evidence that they meant to waive it. My present opinion is in favour of the plaintiffs. Where there is no special agreement, the accounts must be taken on the ordinary footing. Where there are special agreements they must be abided by if they appear to have been acted on by the parties; but if not, the articles must be read as if they contained no such stipulations. There is no difficulty in applying the articles to the business these parties were carrying on at the time when they were executed; but if they chose afterwards to

1818.

JACKSON  
v.

SEDGWICK.

to engage in a business in which the operation of these items would have worked injustice, I say that these are articles which would not have been drawn with reference to such a business, and their afterwards engaging in such a business shews the reason why such stipulations were not acted upon: and if they afterwards went on from day to day without attending to these stipulations, it is impossible now to say, that they are to be considered as in force. I will read the articles, and if on the perusal I do not change my opinion, I am to be understood as deciding in favour of the motion.

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On a subsequent day an injunction was granted as prayed.

## ORDERS OF COURT.

10th *March*, 1818.

IT is hereby ordered, that in future all references of answers of defendants for insufficiency, or for scandal and impertinence, or for impertinence, made in the same cause, be made to the same Master: And it is further ordered, that where answers of defendants have been referred for scandal and impertinence, or for impertinence, and the Court shall afterwards refer the same for insufficiency, the latter reference be made to the same Master as the former reference.

References of answers for insufficiency, scandal, or impertinence, to be to the same Master.

ELDON, C.

*August 5th*, 1818.

WHEREAS it is expedient that the present practice of the Court, with reference to costs in cases in which notices of motion given are abandoned, should be altered:—It is therefore hereby ordered, that from and after the 26th day of *October* next, if a party gives notice of motion, and does not move accordingly, he shall, when no affidavit is filed, pay to the other side forty shillings costs upon the production of the notice of motion;

Where notice of motion is given, and no motion made, forty shillings costs to be paid by the party giving the notice; when no affidavit is filed, and where an affidavit is filed, costs to be taxed, unless the Court directs a certain sum for such costs.

motion ; but when an affidavit is filed by either party, the party giving such notice of motion, and not moving, shall pay to the other side costs to be taxed by the Master, unless the Court shall direct, upon production of the notice of motion, what sum shall be paid for costs : And let this order be entered with the Registrar, and fixed up in the offices of the Six Clerks, and the Registrar of the Court,

ELDON, C.

IN

## IN BANKRUPTCY.

LORD CHANCELLOR.

21st August, 1818.

WHEREAS it hath been hitherto the practice on the petition of the bankrupt with the consent of the creditors who have proved debts under the commission, to issue a supersedeas on a petition presented after the first and before the second meeting, and in some cases when the petitioning creditor alone may have proved his debt and signed such consent, without the concurrence in, or knowledge of such proceeding, by the greater number of the creditors:—I do therefore order, that in future no commission shall be superseded, on the ground of such consent of all the creditors who shall have proved their debts having been given, until after the second meeting. And I do further order, that on the Commissioners being satisfied at the second meeting that a petition will be presented for superseding the commission, with the consent of all the creditors who shall have proved debts, that the Commissioners do in such case adjourn the choice of assignees to some future day, in order to give the opportunity of presenting such petition for a supersedeas in the manner hitherto accustomed.

No commission of bankrupt to be superseded on consent of creditors till after the second meeting: and the Commissioners being satisfied at the second meeting that a petition to supersede will be presented, and consented to by the creditors, are to adjourn the choice of assignees, to give an opportunity of presenting the petition.

ELDON, C.

ME-



## MEMORANDA.

ON the last day of *Trinity* Term 1818, *William Taddy*, of the *Inner Temple*, Esquire, was called to the degree of Serjeant at Law, and gave rings with this motto, "*Mos et Lex.*"

In *Trinity* Vacation 1818, Lord *Ellenborough* resigned the office of Chief Justice of the Court of *King's Bench*. He was succeeded by

Sir *Charles Abbott*, Knight, one of the Judges of the Court of *King's Bench*, who having been sworn into office before the *Lord Chancellor* on the 4th of *November*, took his seat as Chief Justice on the 1st day of *Michaelmas* Term.

In the same Vacation Sir *Vicary Gibbs*, Knight, resigned the office of Chief Justice of the Court of *Common Pleas*. He was succeeded by

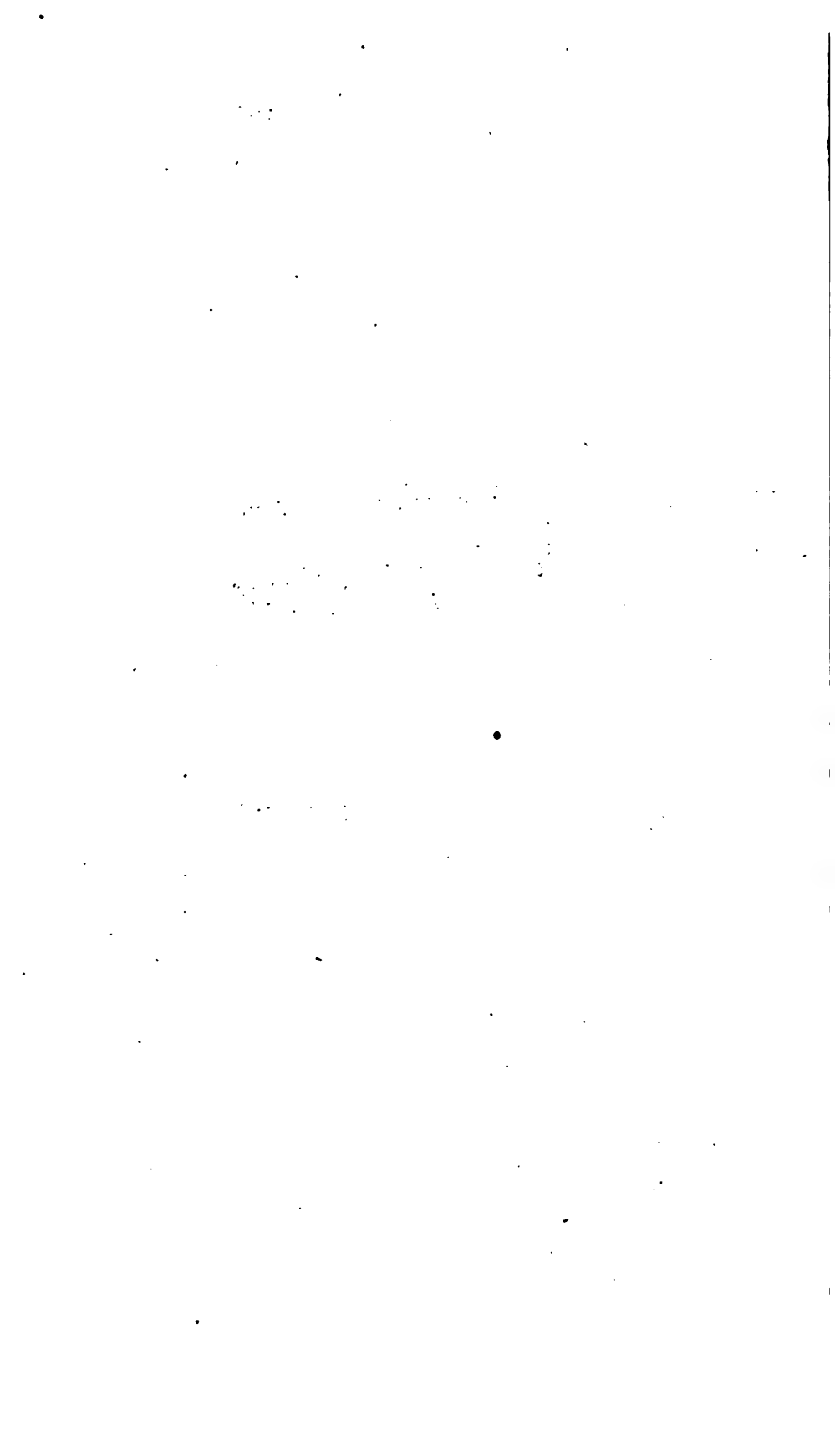
Sir *Robert Dallas*, Knight, one of the Judges of the same Court, who was sworn into office before the *Lord Chancellor*, on the 5th of *November*, and took his seat as Chief Justice, on the 1st day of *Michaelmas* Term.

In the course of the same Vacation *Archibald Cullen*, Esquire, of the *Middle Temple*, *William Owen*, Esquire, of *Lincoln's Inn*, *William Wingfield*, Esquire, of *Lincoln's Inn*, *William Herne*, Esquire, of *Lincoln's Inn*, and *George Heald*, Esquire, of *Gray's Inn*, were appointed to be of the number of His Majesty's Counsel learned in the law.

END OF THE SECOND PART.

**The Reader is requested to make the following Corrections.**

- Page 34, line 6, Erase "with costs."  
— 179, — 22, Erase the Comma, and for "as" read "or."  
— 186, — 29, For "his widow and children" read "his children."  
— 250, — 1, For "in the same year" read "in the year 1807."



# CASES

## IN

# CHANCERY.

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GREENE v. WIGLESWORTH.

1818,  
ROLLS,  
March 7.

**T**HOMAS GREENE, by his will, dated the 3d of September 1796, devised his freehold estates in *Cockersham* and *Skerton*, and his copyhold estates in the manor of *Styne-with-Hest*, all in *Lancashire*, to *Legh*, *Clowes*, and *Long*, for sixty years, upon trusts, for securing an annuity of 1,000*l.* to his wife during her life; and subject thereto, he devised the same unto and to the use of the defendants *Henry Wiglesworth*, *Robert Bradley*, and *George Tennant*, and their heirs, Upon Trust (subject to some intermediate trusts) to convey the same to the use of the testator's son *Thomas* (the plaintiff) for life, when he should attain the age of twenty-one; Remainder to the same trustees to preserve contingent remainders; Remainder to the sons of the plaintiff successively in tail male; Remainder to his daughters as tenants in common in tail; Remainder to the testator's second and other sons successively in tail male; Remainder

A testator having, by will, devised all his estates to trustees, in trust to convey to his son and his issue, in strict settlement, with a remainder to his nephew and his issue; by a codicil directed that a power should be inserted, enabling the trustees, with consent of the son, to sell one of the estates to the nephew, on his agreeing to assume the testator's name, and by a second

codicil directed that the settlement should contain usual powers to the trustees, with the consent of the tenants for life, and guardians of infant tenants in tail in possession, to sell "all or any part" of the estates:—Held, that the special power was not revoked by the general one, but that the settlement must contain both.

1818.  
 GREENE  
 v.  
 WIGLES-  
 WORTH.

to the testator's daughters, as tenants in common in tail; Remainder to his sister *Margaret Bradley* for life; Remainder to his nephew *Robert Greene Bradley* for life, with remainders over to his issue, and to other persons.

The testator, by a codicil, dated the 23d of *August* 1799, after reciting the devise for the term of sixty years, for securing the annuity of 1,000*l.*, and that the lands at *Cockerham* and *Skerton* being quite ample security for that purpose, therefore, and for preventing the trouble of having his trustees admitted to the copyholds, he revoked the devise as to the copyhold estates within *Slyne* and *Hest*, and gave other estates to the trustees for sixty years for securing the annuity: and after devising all his freehold estates at *Cockerham*, and all his copyhold estates within the parson of *Slyne-with-Hest*, to the defendants *Wiglesworth*, *R. Bradley*, and *Tennant*, and their heirs, upon the trusts in the will mentioned, the codicil proceeded in the following words:—  
 “Whereas my son *Thomas* having had the misfortune to be born in *London*, may perhaps prefer some other part of the kingdom to *Lancashire*, which I do not wish; and it may so happen that it may be convenient to my nephew *Robert Greene Bradley* to purchase my estate at *Slyne*; and being desirous that the same may be held and enjoyed by one of my worthy father's descendants, I therefore order and direct that a proper clause should be inserted in the conveyance in tail directed by my will, to enable the trustees therein to be named, and for a valuable consideration, at the request of my said son, to grant, surrender, and convey all or any of my estate at *Slyne*, unto the said *R. G. Bradley*, and his heirs, freed and discharged from the said entails, on his the said *R. G. Bradley*'s agreeing to assume the name of *Greene* instead of *Bradley*.” And the testator directed the money arising from the sale to be laid out in purchase of other estates in any part of *Great Britain*, according to the direction of his son, to be settled to the same uses as the estate at *Slyne*.

By

1818.  
GREENE  
v.  
WIGLES-  
WORTH.

By another codicil, dated the 22d of April 1809, the testator made some alterations in his will and first codicil, and confirmed and republished the same so altered. The second codicil then proceeded as follows:—" I do hereby  
" farther declare and direct, that the settlement by my said  
" will directed to be made, as therein mentioned, shall con-  
" tain usual and common powers to the trustees, with the  
" consent of the tenants for life in possession, and of the  
" guardians of tenants in tail in possession, during the  
" minority of such tenants in tail, to sell and exchange all or  
" any part of the lands and hereditaments devised by my said  
" will, and directed to be purchased and settled as therein  
" mentioned, and for laying out the money arising by such  
" sales, or for equality of exchange, in the purchase of free-  
" hold, copyhold; or customary lands or hereditaments, to  
" be settled to, upon, and under the subsisting uses, trusts,  
" and powers of my said will, and also clauses for giving  
" receipts, and for appointing new trustees, and clauses of  
" indemnity, and all such other usual and reasonable clauses  
" and provisions, as by counsel in the law shall be advised  
" and approved. And I hereby ratify and confirm my said  
" will and codicil so altered as aforesaid."

*Thomas Greene*, the testator's only son; having attained the age of twenty-one, filed his bill against *Wiglesworth, Bradley*, and *Tennant*, the testator's widow, his sister *Margaret Bradley*, and her son *Robert Greene Bradley*; praying a declaration, that upon the true construction of the will and codicils, there ought to be inserted in the settlement and conveyances directed by the will and codicils, a power of selling and exchanging, according to the directions of the second codicil, all the estate devised by the will and codicils, and all other lands since purchased upon the same trusts, including as well the estate at *Slyne*, as the other estates of the testator: and that the defendants *Wiglesworth, R. Bradley*, and *Tennant*, might execute a settlement of all such estates accord-

1818.  
  
 GREENE  
 v.  
 WIGLES-  
 WORTH.

ingly, subject to the provisions for securing the annuity of 1,000*l.*, and that the plaintiff might be let into possession.

The cause was heard on the 28th of *June* 1815, when it was referred to a Master to approve of a settlement and conveyance, according to the intention of the testator, and to state the same to the Court (a).

The Master, by his report, dated the 22d of *July* 1816, approved of the draft of a settlement containing the usual powers to the trustees, with the consent of the tenants for life in possession, and of the guardians of tenants in tail in possession (during the minority of such tenants in tail), to sell and exchange all or any part of the lands devised by the will and first codicil to the defendants the trustees, and the lands directed to be purchased and settled, with the exception of the estate at *Slyne*, in respect of which a special power was inserted in the draft, enabling the trustees, at the plaintiff's request, and for a valuable consideration, to convey the same to the defendant *Robert Greene Bradley*, and his heirs, on the conditions expressed in the first codicil.

An exception was taken by the plaintiff to the report, on the ground that the general power ought to include the estate at *Slyne*; and that the special power, in respect of the estate at *Slyne*, ought not to have been inserted in the draft, or if inserted, that the general power ought to have been also inserted without such exception.

Sir *Arthur Piggott* and Mr. *Pepys* in support of the exception, contended that the special power of sale contained in the first codicil, was revoked by the general one given by the second. The second codicil begins by making some alterations in the limitation of the estates, and notices some interlineations in the will, and then confirms and republishes the will and codicil so altered; and after declaring that the

(a) *Reg. Lib. A.* 1814. fol. 1681.

settlement shall contain a power of sale and exchange, concludes by ratifying and confirming the will and codicil "so altered as aforesaid." The second confirmation could only refer to the alteration made by the introduction of the general power of sale. It could not be the intention of the testator to except the *Slyne* estate from the operation of the second codicil, for he expressly provides that the general power is to extend to "all or any part" of the estates devised by his will. These words the Court cannot possibly reject. They are clear and unambiguous, and will not admit of a construction, by which a part of the estates are to be excluded, more especially if such exclusion is to be by reference not to a subsequent instrument, but to one executed many years before, contrary to the rule, that if there be an inconsistency, the latter instrument is to prevail. It was never argued that the clear and unambiguous words of a codicil could be affected by those of another codicil of prior date. The codicils will admit of only two constructions: either that the first power of sale is revoked by the second, or that both are to stand. But the report is consistent with neither of these constructions. The Master has considered that the first power alone shall stand, that the *Slyne* estate is included in the first power, and excluded from the second. If the first power alone is to stand, much inconvenience must necessarily follow. The estate cannot be sold to any other person than *R. G. Bradley*. Supposing him to refuse to become the purchaser, either as objecting to the price—or not choosing to take the testator's surname, the estate can never be sold. Under the general power of sale, the trustees might sell to *R. G. Bradley*, for a power to sell to all the world must necessarily include a power to sell to an individual.

Mr. Bell and Mr. Roupell for the defendant *Robert Greene Bradley*, argued that the general power given by the second codicil was not inconsistent with the special one contained in the first: that the true construction of both instruments

1818.  
  
 GREENE  
 v.  
 WIGLES-  
 WORTH.



1818.  
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 GREENE  
 v.  
 WIGLES-  
 WORTH.

struments was, that if *R. G. Bradley* should not exercise his right of pre-emption, the trustees should be at liberty to sell under the general power, and that according to this construction, effect might be given to both clauses.

*Mr. Romilly* for the trustees. The estate at *Slyne* having been for two centuries in the testator's family, he was desirous that it should be retained. No personal benefit was meant to the nephew, for he was to purchase for a valuable consideration. The testator could not, by the second codicil, intend to revoke the first, for he expressly refers to and confirms it, nor can he by giving to the trustees the usual and common powers, be considered as having revoked the special power he had before given. The second confirmation was merely introduced out of abundant caution; it is a mere repetition of the words at the beginning of the same codicil, and could not have the effect of revoking the power. Under a general power of sale, the estate might, contrary to the testator's professed intention, be sold to any stranger. This is attempted to be answered by saying that the nephew is to have a right of pre-emption. But the question whether the testator's intention shall take effect, cannot depend on the pleasure of his nephew. On the nephew's declining to purchase, or on his death, the right of pre-emption will be gone, and the estate would then become subject to the general power of sale. The particular intent of the testator respecting the estate at *Slyne*, was, that it should belong to a *Greene*: and his general intent was merely to supply, by the second codicil, the want of a general power of sale. There are many authorities to shew that the Court will give effect to a clause declaring a particular intent, notwithstanding subsequent general words, which may seem inconsistent with it. *Adams v. Clarke* (a), and many other cases. In *Sims v. Doughty* (b), Lord *Atvanley* said, that if upon a general

(a) 9 Mod. 154. 2 Eq. Ca. Abr. 557. 561. (b) 5 Ves. 247.

view of the will, the Court can collect the general intention, or any one particular object; and there are expressions in the will in some degree militating with it, if the Court plainly sees that those expressions are inserted by mistake, it may reject them. In the present case, all the difficulty will be removed by inserting the word "freehold" in the general power of sale, which will then not extend to the *Slyne* estate.

1818.  
GREENE  
v.  
WIGLES-  
WORTH.

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*The MASTER of the Rolls.* Whatever difficulty may attend a sale of the property; the only circumstances the Court can take into consideration; is, what directions the testator has given, and if all his purposes can be reconciled by looking at and construing the three instruments as one, the Court must endeavour to effectuate them, and not add or reject words, unless it should be absolutely necessary. The intention of the testator at one period appears to have been, to give a particular power of sale as to the *Slyne* estate, and at another period, to give a general power of sale as to all his estates, including that of *Slyne*. The question is, whether the latter power alone is to prevail, or whether the two are so consistent, that the Court will direct both to be introduced into the settlement. It is not surprising that difficulties should have arisen on the construction of such instruments as those which are now before the Court. I think I am warranted in saying that the testator had a predilection for the *Slyne* estate, which he had received by transmission from his ancestors. He had separated it by the first codicil from the rest of his property, and settled it in the strictest manner, by a long series of limitations, in favour of his sons and their descendants, and ultimately of his nephew, and thereby, as one would suppose, secured it against alienation. This intention could not have been frustrated by any supposed disinclination of his son to the *Slyne* estate. A more effectual mode of preventing the alienation of this property would have been to suffer the

1818.

GREENE  
v.  
WIGLES-  
WORTH.

the limitations of the will to remain untouched. But with the professed purpose of securing it to the descendants of his father, the testator had recourse to a mode but ill adapted for accomplishing it, namely, by giving to the very son, whose disinclination to reside on this particular property he seems to have apprehended, a power to sell the estate to the nephew, on whose local attachment he seems to have relied, but who might immediately afterwards dispose of the estate to a stranger. But whatever difficulties might have attended the execution of such a power, from its not naming any sum, or from any other circumstance, must have been encountered, for it is a power which the testator did by that codicil actually give, and the Court must insert it if not revoked by the subsequent codicil. It is a qualified power, and unless a sale could be made under it, no sale whatever could be made under the first codicil. It is evident that the testator when he made the second codicil, had not forgotten this power, for he appears to have had the former codicil before him; he makes alterations in the names of two of the trustees, and with those alterations confirms his will and codicil. It cannot therefore be said that he was not aware of the limited power he had previously given. If the Court is to be at liberty to infer that during the interval of ten years which elapsed between the dates of the two codicils, he had altered his intention, it is singular that having before him the very instrument containing the power which it is supposed he intended to annul, he should not have revoked it by express words, and more particularly as the second codicil does actually make some alterations in the first, subject to which he ratifies the former. I cannot therefore consider that he meant to put an end to the power. I feel much difficulty in inserting the word "freehold" in the general power contained in the second codicil. The disposition made by the will is expressly of all his estates, containing no ambiguity. I cannot suppose that he meant to confine the power to his freehold estates, when there is no expression in the codicil to warrant such

such a supposition. A Court is not at liberty by guess and conjecture, to add words when the intention does not require it. The testator speaks generally of "all or any part" of the lands devised by his will. The general power of sale therefore extended to the whole. The latter power is very different from the former, for it is not to be exercised merely at the request of the son, but of any tenant for life, and by the guardian of a tenant in tail. There is no inconsistency in saying that as to the *Slyne* property there should be a special power of sale to be exercised by the son in favour of *Bradley*, the nephew, which, as to both, would cease with the life of either of those individuals, for there is nothing to carry it beyond that period. The object of the power was the supposed personal attachment of *Bradley*, and the supposed disinclination of the testator's son, to the estate at *Slyne*. But notwithstanding that power, it might be necessary that there should also be a general power of sale or exchange, for the first was limited to a sale by the son to the nephew. I do not see any such incompatibility as will enable the Court to reject either the one or the other of the powers. If the nephew should decline to purchase, there would be an end of the power given by the first codicil. Any difficulties which might arise in the execution of the power do not furnish an objection to its insertion in the settlement. The execution of a power of sale may frequently be attended with considerable difficulties, as when it is only to be exercised during the lives, or with the consent of particular individuals. The proper construction upon the whole of the three instruments appears to me to be, that the settlement should contain a general power affecting all the estates, and also a special power to sell the *Slyne* estate.

1818.  
GREENE  
v.  
WIGLES-  
WORTH.

---

" His Honour doth declare, that the provision in the first codicil, whereby it was directed that a proper clause should be inserted in the conveyance in tail, directed by the will, to enable

1818.

GREENE

v.  
WIGLES-  
WORTH.

enable the trustees therein to be named for a valuable consideration, at the request of the testator's son, to grant, &c. all or any part of his estate at *Styne* unto the said *R. G. Bradley*, freed and discharged, &c. [following the language of the first codicil,] is, upon the true construction of the said codicil, to have effect only during the joint lives of *R. G. Bradley*, and of the son of the testator: And his Honour doth also declare, that the provision in the second codicil, whereby it was directed that the settlement should contain the usual and common powers, &c. [following the language of the second codicil,] is, upon the true construction of the said first and second codicils thereto, to extend to and to comprise the copyhold estate at *Styne*, as well as the other estates devised by the will, but subject, as to the estate at *Styne*, to the special power given with respect thereto by the first codicil. And therefore his Honour doth order that so much of the exceptions, whereby it was insisted, that the special power, in respect of the estate at *Styne*, should not be inserted in the draft be over-ruled; and that so much of the exception, whereby it was insisted, that there ought to be inserted in such settlement a power for the trustees, with the consent, &c. to sell or exchange all the estates, including as well the estate at *Styne* as the other devised estates, be allowed: And it is ordered, that it be referred back to the Master to review his report, and to approve a settlement pursuant to the declarations hereinbefore made." [Reg. Lib. A. 1817. fol. 1927.]

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The ATTORNEY-GENERAL, at the Relation of  
W. IZARD, v. BROWN, and Forty-Seven Others.

1816,  
April 2, 30, 11.  
November 25.  
1817,  
December 24.  
1818,  
April 3.

THE information filed the 26th of November 1814, stated that by act of Parliament, 50 Geo. 3, intituled, 'An act to repeal an act made in the thirteenth year of his present Majesty (a), "for paving, lighting, and cleansing the

By act of Parliament, commissioners were empowered to levy a rate on the occupiers of houses in Brighton, for paving, &c. and another rate for supporting groyne to protect the coast against the encroachment of the sea, the latter not to exceed a certain sum on every chaldron of coal brought to Brighton, the inhabitants being stated by the act to be unable to raise sufficient

(a) 13 Geo. 3. a. 24. This act was not stated in the information, but as some of its provisions were alluded to in the progress of the cause, the substance of them is here added. Power was given for seven or more of the commissioners appointed for carrying the act into execution, to direct the streets, &c. within the town, to be cleansed and lighted in such manner as they should think necessary: and for defraying the expences so incurred in every year after the passing of the act (the first year to be computed from the 25th of December

1772) or oftener, if they should think necessary, to make one or more rates or assessments, to be signed by seven or more of them, on the tenants or occupiers of all hereditaments within the town, not exceeding in the whole, in one year, three shillings in the pound, on the rate made for the relief of the poor: the money so raised to be paid to the collector, with powers of distress and sale, in case of non-payment. There were also provisions enabling any person who should have obtained an order from five or more of the commissioners to inspect

money for the latter purpose, without the aid of Parliament; with powers of distress on non-payment of the rates, and to apply any surplus of the latter rate, after payment of debts for which it might be mortgaged, and the expences of repairs, in aid of the former rate. An information being filed by the Attorney-General, at the relation of an inhabitant, against forty-eight of the commissioners who were described as the acting commissioners, stating, that for several years they had levied at the highest rate the duty on coal, and applied great part of the produce towards aid of the paving rate, instead of the support, &c. of the groyne, and the discharge of the debt due on mortgage of the coal duty, and on the relator's refusing payment of the coal duty had distrained his goods, and praying accounts of the money raised for coal duty, and its expenditure, an injunction to restrain the imposition of future rates, contrary to the act, and the levying and receiving of those already imposed, and that the commissioners should personally replace monies they had applied contrary to the purposes of the act; a general demurrer for want of equity was over-ruled: 1st, The grant of the coal duty by Parliament, founded on the rectified inability of the inhabitants to repair the works for defending the town against the sea, being a gift to a charitable use. 2dly, A proviso requiring all suits to be against the treasurer not applying to such a case as the present. And a demurrer *ore tenus* for want of parties (all the commissioners named in the act not being defendants) was also over-ruled, the information being maintainable in respect of past transactions against those who had acted, and it being competent to the Attorney-General afterwards to add as defendants, for the purpose of future regulation, other commissioners who might afterwards act.

1818.  
  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 BROWN.


"town of *Brighton*, and removing and preventing nuisances  
 "and annoyances therein, for regulating the market, for  
 "building and repairing groynes to render the coast safe and  
 "commodious for landing coal and culm, and laying a duty  
 "thereon," and for making other provisions in lieu thereof,  
 'and for regulating weights and measures, and building a  
 'town hall,' the former act was repealed, except so far as  
 relates to the market; and certain persons named were con-  
 stituted commissioners for putting the present act into exe-  
 cution, and that the commissioners should have power to  
 appoint a treasurer and clerk, and a collector or collectors  
 of the rates or assessments to be levied and the monies to  
 be received by virtue of the act, and a surveyor or surveyors,  
 and such other officers, for the necessary execution of the act,  
 as they should think proper; and such persons so to be ap-

inspect the poor rates: and authorising the commissioners to borrow money on the credit of the rates arising under the act. And after stating that the town of *Brighton* was situate by the sea-side, and within six miles of the port or harbour of *Shoreham*, and belonged to the said port, and that great part having been destroyed by the breaking in of the sea, several groynes were some years since erected, which had preserved the town, and that the coast was then safe and commodious, at several times of the year, for ships to unload and land sea-coal, culm, and other coal, on the beach of the town, for the use of the inhabitants, and that the groynes were become greatly out of repair, and *the inhabitants of the town were not able to raise money sufficient to repair the same without the aid and authority of Parliament*: The act proceeded to constitute and appoint the commissioners, or any seven or more of them, "trustees" for repairing, improving, maintaining, and preserving the said groynes, and erecting and building any new groynes, or such other works as to them, or any seven or more of them, at any

general meeting assembled for putting in execution the powers by the act given, should seem most proper. Another clause provided, that for the better effect and support of the premises, there should, from the 24th of June 1773, be paid to the said trustees, and their successors, or such persons as seven or more of them should appoint, the sum of sixpence for every chaldron of sea-coal, culm, and other coal, that should be landed on the beach of the coast at the town of *Brighton*; and the trustees, and their successors, were authorised to collect and receive the same of the masters or owners, or other persons having the rule or command of every ship or other vessel, for every chaldron of sea-coal or culm, or other coal, landed and discharged out of any ship or vessel on the beach or coast of *Brighton*, or otherwise brought into the town within the parish of *Brighton*, and gave power to the trustees to distrain for the rate on non-payment: and also authorised them to make assignments of the rate as a security for money which might be borrowed, not exceeding the sum of £1,500*l*.

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pointed were to deliver to the commissioners true and correct accounts in writing of all monies, matters, and things, received or committed to their charge; and that the commissioners should cause proper books to be kept, and regular entries and accounts to be made of the meetings held in pursuance of the act, and of the commissioners present thereat respectively, and of all acts and proceedings whatsoever relative to the act, and also an account of all monies to be assessed or raised, and received or payable by virtue thereof, and of the application and payment thereof, and of all contracts to be made by virtue of the act; all which accounts should be examined and settled by the commissioners, or any thirteen or more of them assembled at any meeting to be held in pursuance of the act: and the commissioners examining the accounts, and their clerk, should subscribe their names to the same, and the clerk should also subscribe his name at the end of the proceedings of each meeting, and all entries so signed should be admitted in evidence, if necessary, in any court: and such books should be kept by the clerk for the time being, or by such other persons, and at such places, as the commissioners should direct, and should at all seasonable times be open for the inspection of the commissioners, and of all other persons rated and assessed for the purposes of the act, or otherwise interested therein. And it was further enacted (among other things) that for raising money for defraying the several charges and expences of paving, watching, cleansing, and lighting the town, and all other charges and expences attending the execution of the act (except so far as therein otherwise provided for), and for paying the interest, and repaying the monies borrowed upon the credit of the rates and assessments for paving, &c. directed to be levied by the former act, the commissioners were authorised once in every year, or oftener if they should think it necessary, the first year to be computed from the 1st day of *January* 1810, and every succeeding year, from that day in every year, to make one or more equal rate or rates, assessment or assessments,

1818.  
  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 BROWN.



1818.  
 The  
 Attorney-  
 General  
 v.  
 Brown.

assessments, to be signed by any thirteen or more of the commissioners for the time being, upon the tenants or occupiers of all houses, shops, warehouses, coach-houses, cellars, vaults, buildings, gardens, grounds, lands, tenements, or hereditaments whatsoever, within the town, so as such assessments did not exceed in the whole, in one year, 4s. in the pound, on the scale or rate for the time being on which rates are raised for the relief of the poor of the parish aforesaid; and the money assessed on the occupiers, and to be borne and defrayed by them, should be paid by them to the collector or other person appointed by the commissioners to receive the same: and the commissioners were empowered from time to time, when they should judge necessary, to borrow at interest any sum not exceeding the sum thereafter mentioned; upon the credit of the rates to be collected for the purposes of paying, &c. and by any writing under their hands and seals, to mortgage, grant, or assign over the rates, or any part thereof; provided that nothing therein contained should authorise the commissioners to borrow, on the credit of the rates for paying, &c. any larger sum than 3,000*l.*, until the sum of 3,720*l.*, already borrowed upon the credit of the rates, was reduced to a sum not exceeding 2,900*l.*, except for the purpose of building a town-hall, and offices thereto. And it was further enacted, that it should be lawful for the commissioners to continue the market for the sale of all kinds of meat, fish, poultry, butter, and garden-stuff, established by the former act, under the rules thereby prescribed, and to cause the same to be held daily, or less frequently, as to them should appear necessary, and to collect the rents or tolls payable by virtue of the former act, which authorised the commissioners, for the purpose of improving the market, to borrow any further sums of money, not exceeding in the whole the sum of 5,000*l.* upon the credit of the market, and the rents, profits, and tolls thereof. And it was further enacted, that after the monies which were then due, or which should be after borrowed upon the credit of the market, or the rents, profits,

profits, and tolls thereof, should have been fully paid and satisfied, it should be lawful for the commissioners, and they were thereby required to pay and apply any surplus that might have arisen from the market, or the rents or tolls thereof, either in aid of the rate for paving, &c. or of the duty afterwards directed to be levied upon coal and culm, as to them should seem reasonable and proper. After reciting a provision of the former act, whereby it was enacted, that the commissioners therein named should be trustees for repairing, improving, maintaining, and preserving the groynes that had been erected for the preservation of the town, and erecting and building any new ones, or such other works as should appear to them most proper for that purpose, and that the sum of sixpence for every chaldron of sea-coal, culm, and other coal, that should be landed on the beach of the coast of the said town, should be paid to the commissioners, and that the commissioners might borrow any sum not exceeding 1,500*l.* upon the security of the said duty: And after further reciting that the commissioners had accordingly borrowed the sum of 1,500*l.* upon the credit of the said duty, great part of which was then due, and that since the passing of the former act, great encroachments had been made by the sea upon the coast adjoining the said town, and that the said duty had been found inadequate to the charges and expences of erecting new groynes, walls, and other fences or works, which were necessary for the safety and protection of the town against such encroachments: The act of the 50 *Geo. 3.* further enacted, that it should be lawful for the commissioners, and they were authorised and required, from time to time, as to them should seem necessary and expedient, to repair, improve, and maintain, add to, alter, or remove the groynes, fences, or works, then already erected and built, or to be made, erected, and built, or to cause to be made, erected, and built, any new groynes, or other works whatsoever, which might appear to them necessary, requisite, or proper, for the safety of the town, or any part thereof, or any part of the beach or shore within the town:

1818.  
  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 BROWN.

1818.  
  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 BROWN.

town: and that from the passing of the act, there should be paid to the commissioners, or to their collectors, or such persons as they should appoint, any rate or duty which the commissioners should think fit to direct, not exceeding the sum of three shillings for every chaldron of sea-coal, culm, or other coal, which should be landed on the beach of the town, or in any other manner, by land-carriage or otherwise; brought or delivered within the limits of the town: And after several clauses for enforcing the payment of such duty, and other matters relative thereto, further enacted, that it should be lawful for the commissioners, for the purpose of maintaining, repairing, or improving the present groyns or works for the protection of the town, and for erecting new groyns or works, and for maintaining, repairing, and improving the same, to borrow upon the credit of the said rate or duty the further sum of 5,000*l*.

The information further stated that the defendants "were and are" the acting commissioners under the last act; that at a meeting of the commissioners, held on the 2d of *May* 1810, it was resolved, that *Thomas Attree*, of *Brighton*, should be appointed clerk and treasurer to the commissioners, giving security to their satisfaction (which security they had neglected to take, and which offices of treasurer and clerk ought not to be holden by the same person, the duties thereof being incompatible), and at the same meeting it was likewise resolved, that *William Gates*, of the said town, should be appointed collector of the tolls and rates; that *Attree* and *Gates* had ever since acted, and still acted, in the said respective offices; and at the last-mentioned meeting, the commissioners directed, that from that day until the 1st of *May* 1811, the duty on sea-coal, &c. should be three shillings per chaldron; and at other annual meetings held on the days mentioned in the information, the duty was continued at the same rate until the 1st of *May* 1815: that the duty of three shillings per chaldron was accordingly levied by  
*Gates*,

*Gates*, in each of the aforesaid years, on all the sea-coal, culm, and other coal, landed on the beach, or brought to the town; and that *Attree* received from *Gates* the sums levied during the period aforesaid, and after payment of the interest which accrued due on the debt of 1140*l.*, the residue of the debt of 1500*l.* contracted on the credit of the former duty on coals, and of all the expence incurred in erecting or repairing groynes under the said acts, there was, at the end of each of the said years, a very large surplus of the said monies arising from the coal duty; which surplus, on the 29th of *November*, 1813, amounted to 4808*l.* 15*s.* 7*d.* That as there was a debt of 1140*l.* due on the coal duties, it was the duty of the commissioners to have applied a sufficient part of the surplus in payment of the debt of 1140*l.* contracted as aforesaid, and then due, and the surplus or remainder of the sum of 4808*l.* 15*s.* 7*d.* would have been more than sufficient to have answered the expences of erecting or repairing groynes for some years to come; but that the commissioners had lately, in breach of their duty, and without any necessity, *viz.* on or about the 10th of *December* 1813, resolved, that the sum of 2000*l.*, in four several sums of 500*l.* each, should be borrowed at 5 *per cent.* on the credit of the duty on coals, and repaid by the treasurer out of the duties, as follows, *viz.* 500*l.* and interest, at the expiration of six months, 500*l.* and interest, at the expiration of twelve months, 500*l.* and interest, at the expiration of eighteen months, and the remaining 500*l.* and interest, at the expiration of twenty-four months, from the time such monies should be advanced.

The information further stated, that on the 12th of *January* 1814, the commissioners, or some of them, in pursuance of the said resolution, signed three several debentures for 500*l.* each, which money was paid to the commissioners, or *Attree*, their treasurer, for their use, by *Mr. Thomas West*, one of the commissioners. That the commissioners, or some of them, on the 2d of *March* 1814,

VOL. I.

Z

signed

1818.  
  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 BROWN.

1818.  
  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 BROWN.

signed another debenture for 500*l.* to *West*, which money was also paid to them, or their treasurer *Attree*, for their use. That the commissioners have, in every year, from the passing of the act to the present time, misapplied a very considerable part of the money arising from the duty on sea coal, &c.; and that although the act of the 50th year of His present Majesty gave power to the commissioners to impose a duty on sea-coal, &c. not exceeding three shillings per chaldron, to repair, &c. the groyns, walls, or other fences or works, necessary or requisite for the safety of the town, or any part thereof, or any part of the beach or shore within the town, yet the commissioners had constantly, during the period aforesaid, applied a very considerable part of the monies arising from the said duty, in aid of the rate for paving, &c. the town; and that the commissioners imposed, at the several times aforesaid, the duty of three shillings per chaldron on coal, not merely for the purpose of erecting and repairing the groyns as aforesaid, but that they might have a much larger fund to apply in ease of the said town rate.

The information further stated, that on the 4th of *June* 1810, the balance of the money arising from the coal duty, after payment of the expences of erecting and repairing the groyns, and other incidental expences, amounted to 800*l.* 15*s.* 3*d.*; in *November* 1810, such balance amounted to 1613*l.* 5*s.* 5*d.*; in *November* 1811, to 2209*l.* 10*s.* 10*d.*; on the 31st of *December* 1812, to 3657*l.* 8*s.* 1*d.*; and on the 29th of *November* 1813, to 4808*l.* 15*s.* 7*d.*; and that the duty on sea-coal, &c. from the 29th of *November* 1813, to the present time, amounted to a very considerable sum, in addition to the 4808*l.* 15*s.* 7*d.*: That it appeared, from the treasurer's account, that the expences of paving, &c. the town exceeded the receipts under the town rate, the 4th of *June* 1810, by 1004*l.* 7*s.* 8*d.*; on the 23d of *November* 1810, by 1222*l.* 0*s.* 9*d.*; on the 28th of *November* 1811, by 3078*l.* 5*s.* 10*d.*; on the 1st of *January* 1813, by

5309*l.*

1818.

  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 BROWN.

5309*l.* 7*s.* 11*d.*; and on the 29th of *November* 1813, by 7592*l.* 13*s.* 0*d.*: That the annual deficiency of the town rate to answer the expences, were in a great measure made good out of the general balances of the coal duty: That it appeared by the said respective statements, that very large sums arising from the coal duty had been unjustly and improperly applied by the commissioners in aid of the rate for paving, &c. whereby persons who were not resident in the town, but who were occasional visitors thereto, and who greatly contributed to the support thereof, had been compelled to pay a very large proportion of the expences which ought to have been properly borne by the resident inhabitants, viz. the expences of paving, lighting, cleansing, and watching the town: That although the act confined the sums of money arising from the coal duty, and the other tolls and duties thereby made payable, and the town rate, to the respective purposes before-mentioned, yet the commissioners, in breach of their duty, had lately, at the expence, and out of the funds arisen from the duty on sea-coal, &c. caused to be erected a bathing-house or bathing-houses on the beach of the town, the building of which was attended with a very considerable expence, and had applied the said trust fund to several other improper purposes, in violation of the act. The information then stated, that it appeared by the books kept by the commissioners, that on the 21st of *May* 1811, it was resolved by them, that the defendant *W. R. Mott* (one of the acting commissioners) should be paid 500*l.*, in addition to the sum of 70*l.* paid by *Attree*, on account of his expences, relative to the act, and that *Attree* should be paid 300*l.* on account of the act; and on the 11th of *June* 1810, it was resolved, that the sum of 73*l.* 18*s.* 9*d.* should be granted to *Mott* as a remuneration for his services in the act; and accordingly those sums, or a considerable part thereof, were paid to the said respective persons out of the fund arisen from the coal duty: That no part of the sum of 2000*l.* borrowed by the commissioners upon the credit of the coal duty, had been

1818.

~  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 BROWN.

applied by them to the repairing, &c. any groyns, or other works whatsoever, necessary or proper for the safety of the town, or any part thereof, or of any part of the beach or shore within the town, but that the last-mentioned sum had been applied by the commissioners to other and very different purposes, contrary to the act, and in breach and violation thereof, and of their duty in the due execution of the same: That the relator being satisfied that no further duty on coals, &c. ought to be levied, had requested the commissioners, and *Attree* and *Gates*, not to proceed to compel payment of the duty on coal, so directed by the commissioners to be raised, until the whole of the amount of the money so collected and levied as aforesaid, had been fairly and justly expended according to the true meaning of the act; but that the commissioners, their treasurer, and collector, had, notwithstanding such request, proceeded to levy a distress upon the relator's goods for the duty on coals claimed by them to be due from him, and had actually seized and carried away from off the relator's premises, coals to a larger amount than the duty claimed to be due from him.

The information charged, that the act intended that the commissioners, before they imposed any duty on coal, should calculate, or procure an estimate of what was the probable amount of the expences likely to be incurred in the then current year for repairing, &c. the groyns and other fences which might be necessary for the protection of the town against the encroachment of the sea; and that such a duty only ought to be imposed by the commissioners upon sea-coal, &c. as would be sufficient to raise a sum equal to such expence, but for no other purpose; and that if it should happen that the commissioners were mistaken in the said calculations, or that the estimate made should exceed the sum expended, and that such excess should leave an inconsiderable surplus of the coal duty, after payment of the sums borrowed, and the aforesaid expences, and if there was no probability

probability that any further sum would be immediately wanted for the erection and repair of the groynes, then, but not otherwise, such inconsiderable surplus might be applied in aid of the town-rate: That the commissioners did not make or cause to be made any estimate or survey, previously to their imposing the coal duty, to ascertain the amount of the probable expences that would be necessary in erecting, &c. the groynes or other works; so that the commissioners, in imposing the duty of three shillings a chaldron on coals, did not at all regulate themselves by the amount of the expences last-mentioned, but on the contrary, always imposed such duty for the purpose of raising a sum of money to be applied in aid of the town rate; and that the commissioners well knew, at the respective times when they imposed the duty on coal, &c. that for the mere purpose of repairing, &c. the groynes, and erecting or building any new ones, or other works, there was no necessity to impose or levy such duty, and that the money in hand, arising from the previous duty levied, was more than sufficient to answer such expences, or that at least a much less rate than three shillings per chaldron would have been sufficient: That the expences of repairing, &c. the groynes and other works, never, in any one year, were equal to the sum levied for that purpose, but on the contrary, the duty had, in every year, greatly exceeded the expenditure: That in no case, nor under any circumstances, were the commissioners at liberty, under the act of the 50 Geo. 3, to apply any part of the duty arising from coal in aid of the town rate, until they had paid off all monies which had been borrowed upon the credit of the coal duty, yet that the commissioners had made such application of a considerable part of the produce of the coal duty, notwithstanding a debt of 1140*l.* on the coal duty was unsatisfied, and had taken up 2000*l.* more on the credit of the coal duty,

1818.  
  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 BROWN.

The information further charged, that *Altrec*, the treasurer to the commissioners, by their direction, had carried the  
 amount



1818.  
 ~~~~~  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 BROWN.

amount of coal duties, and the rents and tolls of the market, and the rates and assessments made on the inhabitants of the town, to one general account, and that they had thereby appropriated the balance in their hands, or in the hands of the treasurer, on account of coal duties, to the payment of the deficiency in the rates on the inhabitants of the town; the information charging, that the receipts of the duty on coal ought to be applied exclusively to the payment of the monies properly charged on such duty by the commissioners, and the expences of erecting and repairing, &c. the groyns; and that no further rate should be imposed upon coal, but for such purposes: That though the money at present in hand, arising from the receipts of the coal duty, was more than sufficient to answer the above purposes for a considerable time to come, yet the commissioners threatened and intended to levy three shillings per chaldron under the rate last made, and to impose another similar rate upon the expiration of the old one, and that *Altres* and *Gates* intended to collect such duty: and further charged, that the commissioners ought to be decreed to replace to their accounts of the coal duty all such sums of money as they had, as before mentioned, improperly taken from the produce of that duty, and applied to purposes to which they were not applicable under the act of the 50 Geo. 3.

The information prayed, that it might be declared that the commissioners are not entitled, under the act of the 50 Geo. 3, to impose any duty on sea-coal, &c. which may be landed on the beach of the town of *Brighton*, or in any manner, by land-carriage or otherwise, brought or delivered within the limits of the town, but for the purpose of repairing, &c. the groyns, walls, or fences or works already erected and built, or to be made, &c. for the safety of the town: That the commissioners might be restrained by injunction from imposing any duty or assessment on the sea-coal, &c. so  
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landed or brought to *Brighton*, but for the purposes last-mentioned, and that the commissioners might be also restrained from levying, and the defendants *Attree* and *Gates* be also restrained from receiving or collecting, any money under any duty or assessment on such sea-coal, &c. which should not have been made for such last-mentioned purposes: The information also prayed an account of all the monies collected by *Gates*, and received by *Attree*, or by the commissioners, in each year, from the passing of the act of the 50 *Geo. 3*, to the filing of the information, in respect of the duty on sea-coal, &c. and of the application thereof in each of the said years, and of the expences incurred in each year during that period in the repairing, &c. the groyns, walls, &c. erected for the safety of the town, and in erecting new ones, or such other works for the purposes aforesaid; also an account of the money borrowed by the commissioners, and then due on the credit of the coal duty, and what money had been applied in payment of the interest on such debt; that the balance of the coal duty received by *Attree*, or the commissioners, after deducting the expences of supporting and erecting fences against the encroachment of the sea, and the payment of the principal, if any, and the interest of the debt contracted on the duty might be ascertained, and that such balance might be applied in payment of the then debt due on the duty on coals: and that the residue of such balance might be applied exclusively and solely to the payment of the expences of supporting, maintaining, and erecting fences necessary to prevent the encroachment of the sea at *Brighton*; and if it should appear that the money arisen from or borrowed on the credit of the duty on coal since the passing of the act of the 50 *Geo. 3*, had been applied by the commissioners, or by their directions, for purposes not warranted by the act, then that the commissioners might be decreed to replace such money to the account of the duty on coal, &c.; and that in the mean time the commissioners might be restrained

1818.

The  
ATTORNEY-  
GENERAL  
v.  
BROWN.

1818.  
 ~~~~~  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 BROWN.

strained by injunction from borrowing any further sum on the credit of the duty on coal; and that all the commissioners might be directed to keep separate and distinct accounts of all monies thereafter to be levied under the act (a).

To this information the defendants put in a general demurrer, and for cause of demurrer, shewed, "That His Majesty's Attorney-General hath not, by the said information, made such a case as entitles him, in a Court of Equity, to any such relief against these defendants, touching the matters in the said information mentioned and complained of, as is thereby prayed, or any other relief in a Court of Equity." And on the 21st of *January* 1815, the demurrer was, after argument, allowed by the Vice Chancellor. The defendants at the same time alleged as another cause of demurrer *ore tenus*, a want of parties. Against the order allowing the demurrer, an appeal was presented to the Lord Chancellor, and the demurrer now came on to be argued before his Lordship.

(a) The act of the 50 Geo. 3, contained some other clauses to the following effect, which were not stated in the information, but were referred to in the arguments and judgment. It was enacted, that all actions or suits which the commissioners might find necessary to prosecute for the recovery of any damage or sum of money due to them by virtue of the act, should be commenced and prosecuted in the name of their treasurer for the time being, and that all actions and suits which it might be necessary for any other person to commence or prosecute on account of any contract made by the commissioners, or any of them, as such, or by any other person on their behalf, in pursuance of the act, for the non-performance of such contract, or for any other act or thing done by the commissioners, or any of

them, or any other person, by their order, in pursuance of the act, should be commenced and prosecuted against the treasurer for the time being. There was a clause authorising the church-wardens and overseers of the poor to grant a drawback of the duty to such poor persons as were not able to pay the same on any coal for their own use, not exceeding two chaldrons in a year. Another clause enacted, that after the money then due, or which should thereafter be borrowed upon the credit of the duty arisen from coal, and the expences incurred in erecting and maintaining the groyars and other works should have been fully paid, it should be lawful for the commissioners to apply any surplus that might thereafter arise from the duty in aid of the rate for paving, &c. as to them should seem reasonable and proper.

Mr.

Mr. *Leach* and Mr. *Horne* in support of the demurrer. The charge against the defendants of having illegally levied rates for the purpose of illegally applying them, and of their having actually made such illegal application, is not a subject of enquiry in a Court of Equity, but of indictment as a misdemeanor. The relator considering the common law not sufficient to meet the justice of the case, comes to a Court of Equity for the purpose of enforcing the provisions of the criminal law. The information first calls for a declaration that the commissioners are not entitled under the 50 *Geo. 3*, to impose duties on coal, but for the purpose of repairing the groyns erected and to be erected for the safety of the town : in other words, a declaration that they have been guilty of an indictable offence. This is a singular office to be imposed on a Court of Equity. Such a declaration would be an excess of the powers of the Court. The information next prays that the commissioners may be restrained by injunction from imposing any duty or assessment on coal contrary to the spirit of the declaration. The Court therefore is first to tell the commissioners that their conduct is criminal, and then to restrain them from a repetition of the crime. The information seeks to substitute in the place of the punishment to which the offence would be subject by the criminal law, what the relator considers a better security ; the defendants are to be restrained from committing the illegal act, and in the event of their repeating it, to be punished for a contempt of this Court. The information next prays that the commissioners may be restrained from imposing, and the other defendants from receiving money under any assessment which shall not have been made for the specified purposes. The Court is to restrain the treasurer from performing his duty in receiving the sums already assessed—not to leave the parties to the right which the law gives them, but to transfer the jurisdiction to a Court of Equity. The information next prays an account of the coal duties, and the money borrowed on the credit of them. If it shall be found that the commis-

sioners


1818.  
  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 BROWN.

1818.  
 ~~~~~  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 BROWN.

sioners have in hand any sums illegally received, the Court is to declare that those sums are only to be applied to such purposes as the relator considers legal. If it is found that they have nothing in hand that can be legally applied, then the commissioners are to be declared personally responsible for the money received by them. In other words, it calls upon your Lordship to impose a fine on the commissioners; not such a fine as would be imposed by a Court of criminal jurisdiction for an act arising from a mistake of duty, but to the full extent of the monies received. No precedent can be found for the exercise of such a jurisdiction by a Court of Equity. But supposing the Court to have this jurisdiction, what is the manner in which the relator considers that the fine to be imposed on the commissioners should be applied? If money has been improperly levied on persons last year under colour of the coal duty, the justice of the case requires that it should be returned to those by whom it was paid. But the information seeks to have it applied for those future legal purposes to which the coal duty may be applicable. The assessment improperly made in 1815, is, according to the prayer of this information, to be applied in a subsequent year in case of those persons who would have been legally bound to pay the duties. These are funds with which the Attorney-General can have nothing to do. If the commissioners have conspired to take that to which they had no right, they are criminally responsible, and the money may be recovered back at the instance of those by whom it has been paid, but it is not a fund for which the commissioners can be civilly accountable to the Attorney-General.

*The LORD CHANCELLOR.* There are many cases involving criminal matter in which the Attorney-General has filed informations in this Court. Informations have been filed by him here for abating nuisances, which are cases having a criminal character belonging to them; some for nuisances affecting public highways, and for obstructions in  
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navigable rivers<sup>(a)</sup> and harbours. There was one relative to the harbour at *Portsmouth*, where the obstruction was removed, and in others the Attorney-General has had the nuisances abated under the judgment of this Court. There have been several proceedings of the same nature in the Court of Exchequer, and some cases which have gone up to the House of Lords.

1818.  
  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 BROWN.

*For the Demurrer.* The commissioners are liable to an action by every person who has been aggrieved, and to return to every individual the money they have illegally taken. Upon what ground then can the Attorney-General come into this Court, accusing the defendants of having improperly taken the money, stating at the same time that they have expended it, and yet insisting that they are trustees of it under the act of Parliament, and calling on them to account for it, in order to its due application. If the charges in this information are well founded, this is money which can never be applicable to the purposes of the act, for it was not collected under the authority of the act, but in direct violation of its provisions. How then can it be dealt with as a fund raised by virtue of the act? The information does not merely state that the commissioners have collected this money for the purpose of preventing its application, but that they have actually applied it. That is alone a sufficient objection to the Court's decreeing an account. The accounts have been already rendered. Before the Attorney-General can ask for an account of the receipts and payments, it is incumbent on him to shew how the fund can be applied. If there is any fund, the argument for the relator is that it is one which has been illegally collected, and which the defendants would be liable to refund. That alone would be an objection to the account, but the money has been actually paid away.

(a) See *The Attorney-General v. Johnson*, post.

1818.  
 ~~~~~  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 BROWN.


*The LORD CHANCELLOR.* We have lately had that question discussed in a case before the House of Lords, with reference to officers in the customs, where, under acts of Parliament, the offices were not continued, but the duties were continued. One of the arguments in that case was that the Court could not make the party account, because the money belonged to the individuals from whom it had been received. We gave judgment against him, but we confined ourselves to this ground, that although the office was discontinued, the duties remained liable. Our opinion was, and it may be material, that on the construction of the acts the duties were continued.

*For the Demurrer.* That case cannot be considered an authority which applies to the present, for there was a fund in the hands of the parties, which it was impossible for them to say they had not collected for the purposes of the act, and the fund was forthcoming; but in the case now before the Court, the statement of the information is that the defendants have employed the money. The account now asked for must therefore make them responsible, not for monies they have received, but personally responsible for monies, which, though they have received them, they never ought to have received, but which they have in fact applied.

This cannot be considered as a gift to a charitable use. The rates are not voluntary gratuitous payments, but a tax to be levied and collected within the town of *Brighton* for public purposes, with powers to certain officers to enforce the payment, and with remedies to be pursued by individuals improperly charged with the rates. The statute of *Elizabeth* (a) does not apply to this case. In the cases enumerated in that statute, the funds are *given*; here there is no fund given, but certain public officers are appointed to levy and

(a) 43 Eliz. c. 4.

apply money to particular purposes. If they have applied them improperly, they must refund the money to those from whom they received it, but they cannot be accountable for it to the Attorney-General.

1818.  
  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 BROWN.

But the information is defective for want of parties. This was taken *ore tenus* as a cause of demurrer before the Vice-Chancellor. If the Court has jurisdiction to declare that the commissioners have done wrong, and to restrain them for the future, it will not act unless there are before it those persons whose conduct it can regulate so as to protect the public. The commissioners under the act of Parliament are about one hundred, and there are upwards of fifty who are not defendants to this information. It is said that they are not defendants because they have not acted under this statute; yet they may immediately pursue precisely the same conduct which has been adopted by those commissioners who are parties to the suit. The injunction of the Court as to the defendants cannot apply to those commissioners who are not parties. The information prays that the defendants alone may be enjoined. The Court is then to enjoin the forty-eight persons who are before it, and to leave the others to pursue hereafter the same measures. The information is clearly defective. It is a case where justice cannot fairly be done for want of proper parties. The commissioners who had not qualified themselves when this rate was imposed may have since done so. Others may qualify themselves immediately after the decree, which, so far as respects them, will be of no effect, for the only persons bound by it would be those commissioners who are parties to the suit. The other commissioners might, without being guilty of any breach of the injunction, repeat the very acts intended to be restrained. But that is not the only objection, for the commissioners who are absent are not represented by those who are present. Upon what principle then can their conduct bind the whole? It is not merely that the injunction will not apply to the whole body of commissioners, but  
those



1818.

~  
The  
ATTORNEY-  
GENERAL  
v.  
BROWN.

those who are absent are entitled to assert their rights. A distinction is supposed to exist between the acting commissioners, and those who have not acted; but the act of Parliament makes no such distinction. Its language relates to the commissioners generally. It imposes a penalty on commissioners who shall act without a qualification, but it does not invalidate their proceedings. The defendants form but a small number of the commissioners, but the relief asked is against all of them, and the prayer seeks for a complete regulation of the conduct of all the commissioners. It is impossible to sustain such an information without making the other commissioners parties. The accounts prayed for cannot be taken against those who are not parties. To take the accounts effectually the whole body of commissioners must be before the Court. The act having appointed the commissioners without distinction, the relator cannot have the power of selecting some, and of entirely passing over the others. The acts complained of are not alleged to be merely the acts of those commissioners who are defendants. The commissioners may be a fluctuating body, and the acts complained of may have been done by those who are not parties. The information seeks to have an account of all their past conduct, with a view to make them responsible in matter of account for the funds which they have improperly raised. How is the Court on such an information to regulate the conduct of the commissioners in future? This ground of demurrer was argued before the Vice-Chancellor, and we apprehend the demurrer was allowed on this ground as well as the others.

*The LORD CHANCELLOR.* The course of the Court is, that if a defendant cannot sustain the demurrer on the record, he is entitled to demur *ore tenus*, but in that case he must pay the costs of the demurrer on the record.

*For*

*For the Demurrer.* The act of Parliament provides particular remedies for persons who are aggrieved, a circumstance which affords an argument against the right to resort to any except those prescribed by the act. It expressly directs that the remedies the parties are to have shall be against the treasurer of the commissioners, who shall be the only defendant in every action or suit. Upon what ground then can this information be supported, in which the treasurer is neither plaintiff nor defendant? It is true that *Gates*, who now holds the office of treasurer, is a defendant, but he is not proceeded against solely as treasurer, but in his character of commissioner. He is stated to have been elected treasurer, and particular relief is prayed against him, but that does not remove the objection. The act intended that the treasurer should be the only plaintiff or defendant, where a suit should be brought for any thing done under the powers of the act. What is now complained of was done under the powers of the act. There is no ground for the substitution of the Attorney-General in the place of the individuals aggrieved, nor for his coming into a Court of Equity with an information, instead of proceeding against the individuals in a Court of Criminal Jurisdiction. It is clear that the act contemplated such a case as the present, for it has provided a remedy against the misconduct of the treasurer.

1818.  
The  
ATTORNEY-  
GENERAL  
v.  
BROWN.

*The LORD CHANCELLOR.* If there is an equity to restrain the levying of the duties in future, the account could not properly be taken against the treasurer. This information seeks relief as against that which the treasurer is not at all authorised to do. If the information can be maintained at all, I apprehend it can only be maintained against the commissioners, for the treasurer has no power to do the acts complained of, and sought to be restrained.

*Sir Arthur Pigott, Sir Samuel Romilly, Mr. Bell, and Mr. Newland*, in support of the information. The demurrer  
on

1818.  
  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 BROWN.

on the record cannot be blended with the demurrer taken *ore tenus* for want of parties. This is an appeal against the decree of the Vice-Chancellor, by which he allowed the demurrer on the record, and having allowed it, he could not pronounce upon the demurrer on the other ground, which was taken *ore tenus*; for supposing that the latter might have been made a good ground of demurrer, yet having been suggested *ore tenus*, it could not be entertained, unless the demurrer on the record was over-ruled. The present appeal brings before your Lordship nothing but the simple question whether the demurrer on the record, for want of equity, is valid. The Vice-Chancellor proceeded on that demurrer alone, and the other is entirely out of the question. There is however no defect of parties in this case. It is settled that when there are several executors, of whom some only have proved the will, it is not necessary in a suit for administering the assets, that the executors who have not acted should be parties. If a bill should be filed by a legatee, alleging that of two executors appointed, one only had acted, and that he intended to pay the plaintiff's legacy to another person, by whom it was claimed, and seeking to restrain the payment; the executor who had not proved might afterwards possess himself of part of the estate, and pay the legacy to the party claiming in opposition to the plaintiff, yet that circumstance would not make it necessary that the executor who had not acted should be a party. The rule is, that a plaintiff is not authorised to make any one a defendant, unless he can pray some relief against him. No relief could be prayed in this case against the commissiuners who have not acted. The gravamen of the information is, that the commissioners have levied and misapplied the funds, which misapplication is referrible to those individuals alone by whom they have been misapplied, for it is impossible that a person can be made participant in the violation of an act of Parliament, merely by naming him as a defendant. He cannot be answerable for the conduct of those who alone have interfered.

It has been contended that this information charges the commissioners with criminal matter. In a subsequent part of the argument it will be shewn that it does not; but for the present conceding that point for the sake of argument—this is a general demurrer both to discovery and relief; and in order to support such a demurrer, the defendants must shew that there is no part of the relief prayed to which the plaintiff can be entitled. If therefore the defendants can establish their proposition that some part of the information does charge them with an indictable offence, it would not induce the Court to allow the present demurrer; for though some part of the information should relate to criminal matter, there are other parts which cannot by possibility have any such relation, and particularly the prayer for an account of the receipt and application of the duties. It is not sufficient for the defendants to say that there is a part which relates to criminal matter, though it might be a ground for their objecting to answer that part of the bill. It would be no answer to the whole relief prayed by this information, nor indeed to the relief which arises out of the criminal transaction. Although a person may not be entitled to pray for a pecuniary advantage which arises out of a transaction amounting to a felony, yet he may be entitled to pecuniary amends where his claim arises out of a transaction which amounts only to a misdemeanor; and it will be no defence for him to say that the matter out of which the claim arises is a criminal proceeding. It is therefore to no purpose to discuss at present the exact portion of relief to which the Attorney-General may be entitled. If your Lordship can grant any part of the prayer, it is sufficient to induce you to over-rule the demurrer. All the same advantages will be open to the defendants when they answer the information. Though it is settled that when a plaintiff not entitled to relief, though entitled to discovery, files a bill praying both discovery and relief, a general demurrer

1818.

**The  
ATTORNEY-  
GENERAL  
v.  
BROWN.**

1818.  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 BROWN.

démurrer will be supported (a), the converse of that proposition does not prevail; for if he be entitled to relief, though not to discovery, a general demurrer to both must be over-ruled. It is quite clear that the levying and application of the duties stated in this information, are contrary to the true construction of the act of Parliament, which meant to provide that the duties should be levied for the repair of the groyns, and that any accidental surplus which might remain in hand after those purposes were answered, might be applied in aid of the town rates; not that the duties should be imposed by the commissioners without reference to any contemplated expenditure on the groyns.

No authority has been adduced in support of the assertion that the acts alledged in the information amount to an indictable offence. There is no allegation that the defendants have acted corruptly, or that they have applied the monies to their own use. The allegation is merely that the duties were to be raised for a particular purpose only, and that they have been applied to a different purpose; that they have been applied for the benefit of all the inhabitants, instead of for purposes of a general and public nature. How can this be criminal conduct, which subjects them to an indictment, and upon conviction, to punishment by fine and imprisonment? The whole argument rests on this; that we are transferring a criminal transaction from a Criminal Court to the cognizance of a Court of Equity; but in order to raise this argument, it is assumed that this is a criminal proceeding on the part of the defendants. Was it ever supposed that the commissioners under an act of Parliament, because they had mistaken the construction of the act, and applied part of the money to some other purpose than that which the act intended, were

(a) *Price v. James*, 2 Bro. C. C. 319. *Collis v. Swayne*, 4 Bro. C. C. 480. *Baker v. Mellish*, 10 Ves. 544. and the references in 10 Ves. 553.

guilty

guilty of a misdemeanor? Before any one can arrive at such a conclusion, the authority of some decided case, or of some text writer on the criminal law, should have been produced. It is not sufficient for a defendant who is accused of a civil breach of trust, simply to assert that what is alledged against him is a crime, and that he is therefore not bound to answer. It was never considered that a magistrate acting with a delegated authority could be made subject to a criminal proceeding, unless he acted from corrupt motives; and nothing in this information imputes such motives to the defendants. It seeks a declaration from the Court that the commissioners ought not to impose any duty on coal but for the purpose of supporting the groynes erected or to be erected for the safety of the town. Is this calling on the Court to declare that a crime has been committed? Is a person even voluntarily disobeying an act of Parliament indictable for so doing in every case? Many things are prescribed by an act of Parliament, for the disobedience of which a person will not be subject to a criminal information or indictment; it must manifestly appear that he has acted corruptly.

1818.  
  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 BROWN.

Supposing the defendants can establish the proposition that this is a criminal act, yet if it be a breach of a public trust, the *cestuique trusts* have a right to a declaration by this Court, that the acts complained of ought not to have been done, and that they ought not to be repeated. The proposition contended for would go to a great and alarming extent. It would extend to all conspiracies and confederacies to obtain deeds and wills from persons incapacitated by imbecility of mind from executing such instruments; for these would be criminal acts. But is a Court of Equity on that account to be deprived of its jurisdiction? The only reason for the non-interference of a Court of Equity in matters of felony is, because, generally speaking, they involve transactions out of which no civil rights arise; but if civil rights do

1818.  
  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 BROWN.

arise out of a criminal transaction, the criminal nature of the subject is no objection to the interference of a Court of Equity. The prayer that the commissioners may be restrained from levying, and the treasurer and collector from receiving, the rates which shall not have been made for the purposes of the act, is not a prayer that they may be restrained from committing a crime, but from doing that which would be injurious to civil interests. A party may have a civil remedy for an act which amounts to a misdemeanor; as in the case of an assault, which, though punishable criminally, may also be made the subject of an action. Courts of Equity, in cases of fraud, have considered themselves bound to decree relief, where more than one of the parties might have been punished at common law. A suit may be instituted in this Court for restraining a nuisance, which is a criminal act. In *Baines v. Baker* (a) and *The Attorney-General v. Cleaver* (b), the principle was admitted, though the Court did not interfere under the particular circumstances. This is a sufficient answer to the objection made by the defendants, that this Court will not restrain a party from committing a criminal act.

If this information will not lie, it is clear that there can be no remedy against the abuses complained of. This is not a case in which the Court of King's Bench would grant a criminal information, neither could an indictment be supported, as the defendants do not appear to have wilfully exceeded their authority. For any thing that appears to the contrary, they may have merely mistaken the construction of the act. Nor is there any civil remedy by which the relief we ask can be obtained in a Court of Law. This information has two objects; first, to bring back the surplus of the coal duty, and to make it applicable to preserving the groynes; and secondly, to restrain the defendants from any

(a) *Amb.* 158. 3 *Atk.* 750.

(b) 18 *Ves.* 211.

further

further levy of the duty. Suppose an action of trespass should be brought against the treasurer, the plaintiff might indeed recover some trifling damages; but the surplus of 5000*l.* would yet remain unemployed in the hands of the defendants or their treasurer. Suppose an appeal should be preferred at the Quarter Sessions, the Justices might quash the rate, but they could do no more. The commissioners might continue to impose further duties, notwithstanding there should be a large balance in their hands applicable to the repairs of the sea fences.

1818.  
  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 BROWN.

The present suit is nothing more than a suit against trustees, calling on them for an account of the execution of their trust. The declaration, and the whole of the relief prayed for, are consequential on their liability as trustees. It is contended that the Attorney-General has nothing to do with this case. The information insists that the duties could only be levied for the purpose of keeping the town protected from the inroads of the sea; that the funds not having been so applied, the commissioners are bound to account for all the money, and are bound to consider this as a fund in their hands still unapplied. The question is, whether, upon this short statement, this being a public purpose, in the nature of a public charity, in which all His Majesty's subjects have an interest, any one individual may not be a relator, for the purpose of bringing before the Court a statement of an abuse of such a public trust. If any individual can be a relator for such an object, all the objections made incidentally can be of no avail. It is contended that this is not a charity or public purpose, in respect of which the Court will suffer an information to be filed by the Attorney-General at the relation of a private person. The right of the Attorney-General to sue here by information is not confined to cases of charities. Lord *Redesdale* (a) puts the case of a charity

(a) *Miff.* 7.



1818.  
 ~~~~~  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 BROWN.

merely as one of the instances of that mode of proceeding. It is objected that this is not a fund created by the donation of an individual, but from public contribution authorised by the Legislature. Can it be contended that this Court will not entertain an information respecting the application of funds so raised by a public imposition on persons importing certain articles? It cannot be maintained that this Court will not entertain an information, because the fund is raised by public contribution. Suppose that these duties had been raised in consequence of a petition to Parliament, representing that there were no charities in the town of *Brighton*, and that it was extremely desirable that there should be institutions of that kind for the public education of children, and for placing them out as apprentices, or for other objects, which most clearly were charitable purposes, and that the trustees were not warranted in their disposition of the funds so raised—if it turned out that the trustees were entrusted with the money as these trustees are, raised by duties on persons who import goods for the consumption of the inhabitants, and which are paid for by the inhabitants—could it be contended that because it was raised not by voluntary donations, but by public contribution of all persons availing themselves of the convenience of importing the goods, the trustees might with impunity violate the trust? If the trustees were guilty of a breach of their trust, by diverting the funds to their own use, or to other purposes than those to which they were destined, could it be contended that this was a case in which the Attorney-General could not file an information to compel the application of the fund to those purposes? What are the purposes to which such a mode of proceeding can be applied, if these are not of that description? It is clear from a passage in *Duke (a)*, (which forms part of the commentary of which Sir *Francis Moore*, who was employed in penning the statute of Charitable Uses, is supposed to be

(a) *Duke*, 129.

the author), that there is no distinction between a fund created by a deed, and one created by statute: "An imposition granted upon commodities imported or transported, to be employed upon repair of ports or havens where they shall land, is a charitable use, and within this statute." The book in which this passage occurs was published in the reign of *Charles the Second*, and not long subsequent to the *Petition of Right*, by which it was declared that no imposition should be made but by act of Parliament. The passage therefore cannot be understood as referring to any act of the Crown: but even supposing it refers to a grant of the Crown, such grant would be considered as a document of a public nature; and it removes the objection that those duties cannot be subject to a charitable use, because they are created by an instrument of a public nature. Nor can the circumstance that the defendants are commissioners appointed by act of Parliament, exclude the jurisdiction of this Court. There are many instances in which the Court has interfered to controul the conduct of commissioners under inclosure and other acts (a).

1818.  
The  
ATTORNEY-  
GENERAL  
v.  
BROWN.

Mr. *Leach*, in reply.—This is the most important case which has occurred in a Court of Equity since I have attended one. It is no less a question than this—whether it is the duty of a Court of Equity to declare the authority of the law to every person employed in the collection of every contribution throughout the empire, with the single exception of contributions in respect of the public revenue—whether, with that exception alone, a Court of Equity has power to restrain the officer from proceeding contrary to what it shall declare to be his duty, and to make him personally responsible for the whole sum he may, under an error of judgment, impose on the public. It is said, that if the Court has not this jurisdiction, there is a great defect in the

(a) See *Speer v. Crafter*, 17 Ves. 216. *Hawes v. James*, ante, p. 2.  
law.

1818.  
  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 BROWN.

law. Much weight cannot be laid on that observation; for if the country has proceeded ever since the conquest without feeling the defect, it is not likely that much inconvenience will ever be experienced from it; and it seems to be admitted that it has never hitherto occurred to any one to represent that such a jurisdiction resided in a Court of Equity. It is not asserted that an attempt has ever been made to file such an information as the present. Undoubtedly, if there be a clear principle to shew that the jurisdiction contended for, though it has never been called into action, does, on principles of the constitution, reside in this Court, your Lordship will entertain the present information: but you will first be satisfied that the principle exists; for no alledged principle of convenience can give your Lordship authority to extend the jurisdiction of the Court. The proposition contended for, on the other side is, that there resides in a Court of Equity a jurisdiction to examine into the conduct of commissioners under a local act, to restrain them in what was illegal, and, in the nature of a fine, to impose on them personal responsibility. By the common law, if commissioners acting under such an act of Parliament should abuse their trust, it would either amount to a misdemeanor, for which they would be criminally responsible, or they might be instructed in their duty by an information in the nature of a *quo warranto*. In *The King v. The Corporation of The Bedford Level (a)*, Mr. Justice *Lawrence* appears to have considered that as the proper mode of proceeding against commissioners under an act which empowered them to impose rates. An action might also be supported against the officers who had distrained; and by that mode the authority of the commissioners could be tried. If the commissioners have been guilty of corruption, they are criminally responsible—If of error merely, there is a way of instructing them what their duty is—If injustice has been done to any one, there exists a

jurisdiction to afford him relief. Where then is this great public inconvenience which requires that your Lordship should be called upon? What precedent is there for calling upon you? Upon what principle is it they desire to introduce this novelty—that a Court of Equity is to have imposed upon it the duty of instructing, restraining, and calling to account every officer in this empire who may be concerned in the administration and collection of public rates, except where they relate to matters of revenue?

1818.  
  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 BROWN.

I understand the duties of the Attorney-General to be these. In all matters of crime, the King, as *Parens patriæ*, is the prosecutor. Every criminal prosecution belongs to the Attorney-General as representing the public prosecutor. The Attorney-General is the servant, not of the public, but of the Crown. Generally speaking, he has no controul over civil rights. His duty is to assert those rights of the Crown which the King cannot assert himself. The King must have an officer to assert his civil rights, and the Attorney-General is that officer. Beyond this however he has some duties to perform, to which your Lordship has referred; he is to enquire as to public nuisances in rivers, harbours, and on the King's highway. A subject may abate such nuisances. The Attorney-General may bring an English bill for abating a nuisance, in which the King has a right: he may sue in a public court to abate a nuisance on a river or a public highway. In all cases in which the subject might abate the nuisance, the Crown permits the Attorney-General to sue. It is on the principle that it is a great public interest which it is the duty of the Crown to enforce. But beyond these instances (with the exception of the cases of charities to which I shall afterwards more particularly advert), there is no case in which the Attorney-General has proceeded by information in a civil suit. There is no precedent to be found, that where persons in a certain local situation have an interest, the officer of the Crown is called upon. They have

1818.  
 ~~~~~  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 BROWN.

have no right to press the servant of the Crown into their service to protect their rights. It is no answer that if the Crown does not protect them, they may have no other protection. The relator has no right to employ the assistance of the Attorney-General. No inconvenience can result from not permitting him so to do; for the common law has provided, on the principle I have stated, certain remedies, without the interference of the Attorney-General; and it has always been thought that those remedies were effectual. If not, application must be made to Parliament. If it is found that our administration of justice is in any instance defective, a remedy must be obtained from the Legislature. Out of this enumeration of the duties of the Attorney-General, I have expressly reserved his authority on subjects of public charity. It is the duty of Courts of Equity to administer trusts. Courts of Law cannot reach the administration of trusts. But Courts of Equity take into their consideration those who have the real interest in the property. It is not the visible owners, but the beneficial owners, who have a right to claim in a Court of Equity those rights which belong to them. From this principle has grown the principle of administering the trusts of a charity. All persons are responsible for the administration of the trusts of a charity in this Court. When the trust is for a public charity, the objects, generally speaking, are of a public nature; and nobody can qualify himself as having an immediate and personal interest in them. No person could call the trustees of a public charity to account, unless the principle of law afforded him a right to the assistance of the Attorney-General. The Attorney-General is permitted to represent the complainant with respect to the administration of a charitable trust, because it is the duty of the Crown to protect the interests of a public charity; and its protection is only to be effected by the same officer who protects its own rights. It is because it is the duty of the Crown to protect the administration of a public charity, that the Attorney-

Attorney-General represents the Crown as *Parens patriæ*. Now, it is argued that this is a charitable trust, because in the statute of *Elizabeth* it is declared that if money is given by any person to be devoted to certain specified objects of a public nature, it shall be deemed to be a public trust, which it shall be the duty of commissioners to see duly performed. And it is contended that as the repair of groynes *may* be a charitable trust, therefore every repair of groynes *is* a charitable trust. The statute has provided that money given by pious and well-disposed persons, for the repair of ports, havens, and sea banks, is a charitable trust, and the commissioners are to see it executed. It is the charitable motive which makes it a charitable purpose; and I admit that it is immaterial whether the property is given to one or to many, or whether it is given by an individual or by the Legislature. But where the charitable motive is wanting, though the purposes to which the fund is applicable might otherwise fall within the description of a charitable use, it is not to be considered as a charitable use in this Court. These are rates which it is compulsory on the commissioners to levy, and on the inhabitants to pay. It might with equal reason be insisted that money devoted to the repair of a county bridge is a charitable use, for it is a contribution by many, and is levied by a county rate; so that every person who pays a county rate is the founder of a charitable use. The argument is, that because if a person voluntarily devote property to a public purpose from motives of benevolence, it is a charitable use, therefore when a person pays a county rate, he is the founder of a charity. It is said that the King has an interest in rivers and highways, and that the Attorney-General is to assert those rights: that the same interest which he has in ports, rivers, and highways, he has in the seas, for the purposes of navigation; and therefore the Attorney-General is to have a right to file this information, to prevent the encroachments of the sea on the shores of *Brighton*, to the general prejudice of the navigation of that part of the coast.

1818.

The  
ATTORNEY-  
GENERAL  
v.  
BROWN.

1818.  
 ~~~~~  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 BROWN.

coast. It would be difficult to find how the general navigation of the country could be affected because a yard or two of land was washed from the coast. But no such proposition is stated on the record. The counsel for the relator should have read some passage in the information to shew that it was filed by the Attorney-General to protect the navigation of the seas. The information, on the contrary, expressly asserts that all has been done which ought to have been done as to the encroachments of the sea. The information does not complain that the commissioners have forgot their duty as to the repairing of the groynes; but that after having done their duty in that respect, they have applied the surplus to illegal objects. But it is also said that the Attorney-General protects the public in other matters besides public charities; and a passage from Lord *Redesdale's* Treatise is quoted in support of that proposition. But Lord *Redesdale* is not a text writer; he does not profess to declare what the law is; and his Lordship has not referred to any case which will justify the Court in saying that the Attorney-General should represent the public in such a case as this. The only argument is, that nobody else can represent the public. The law however has thought that the provisions of the common law are sufficient to protect the public. If that is a mistake, it must be remedied elsewhere, not by an argument of convenience addressed to this Court, and calling upon it to assume a new jurisdiction. It is contended that this information calls on the commissioners to apply what they have legally levied to purposes to which it may be legally applied, and to be personally responsible. That would not be a measure of justice which a Court of Equity would adopt. It would hardly call upon commissioners, who have acted from a sense of duty, to be personally responsible. It would not impose a fine upon persons who have acted from error. It is admitted on the other side, that in a Criminal Court a man cannot be punished by fine for a mere error of judgment. Neither would a Court  
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of Equity say that a fine ought to be levied for an error in point of judgment. The question is, whether a Court of Equity will not direct the commissioners to administer what they have in their hands to the purposes of the trust. There would be a great difficulty if the case could be so stated as that the Court of Equity could deal with it. The principle which authorises the Court to direct a trustee who has funds in his hands to make a proper application of them, cannot be disputed. There would be no difficulty, provided the Court could reach the parties. But in the present case, who can so represent the parties as to be able to bring the case before the Court? The Attorney-General could not; therefore there would be extreme difficulty in reaching the parties, though there should be no difficulty in reaching the principle. The answer here is, that the facts alledged in argument are contrary to the record. This information represents not that the trustees may have a balance legally received, and with respect to which they ought to be subject to a Court of Equity as to its application, but it proceeds on this, that the balance is illegally received; that if they have a shilling unapplied, they ought not to enforce the rate; that they ought not to hold any money in their hands. A Court of Equity cannot compel the application of money illegally obtained. There is no instance in which a man illegally receiving money can be called a trustee within the meaning of a Court of Equity. It is said that these commissioners are called trustees. It appears highly probable that for the word "trustees" we ought (at least in one passage) to read "treasurer;" and then it is a mere mistake. The name however cannot alter the character. It is immaterial by what name they are called; if their duties are not in the nature of trusts, they are not trustees within the scope of the administration of a Court of Equity. There is no public officer, from the Crown downwards, who is not in some sense a trustee. These are parties appointed, not to be possessed of a certain fund to be applied, but who are themselves to raise the fund; and the whole of the information

1818.  
  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 BROWN.



1818.  
  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 BROWN

looked more accurately into the subject. Taking this to be such an information as, with regard to its subject-matter, the Attorney-General can file at the relation of individuals, the question would be, whether the demurrer, on some of the grounds which have been stated, could or could not be supported. One of those grounds is that the treasurer only can be sued. My opinion is that this is not a ground on which the present information can be repelled. It has been further said that the information calls on the defendants to give answers to none but criminal questions. That ground of demurrer must be examined, first, by enquiring whether it is truly predicated of this information, that it does nothing else but call on them to answer criminal questions: for if it requires them to answer questions of that nature, and also calls on them to answer respecting innocent transactions, the general demurrer will not hold; for in that case it will cover too much. The next question is, supposing it to call on the defendants only to answer to criminal matter, whether if the Attorney-General's information, at the relation of a private individual, could be supported with reference to the subject-matter, that is a sufficient ground of demurrer? and as at present advised, I apprehend it is not; for though it was settled first by Lord *Thurlow* contrary to the opinions which had previously been entertained, that if a bill is filed for discovery and relief, and the plaintiff cannot obtain the relief, he cannot have the discovery, yet the converse of that proposition does not hold. A party may be entitled to relief, though not through the discovery which he seeks. If he can lay his ground of claim to relief, he will be entitled to it, though not by any thing the defendant has stated in his answer. If this be a case in which the Attorney-General, with reference to the subject-matter, is entitled to the relief he prays, it will be found in principle and precedent, that if the Attorney-General could make proof of what he alleges, he would be entitled to relief.

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That brings it to the question, whether the subject-matter of this suit is such that the Attorney-General, who is the officer of the Crown; and in that sense, the officer of the public, entrusted with the obligation to enforce those rights, in the enjoyment of which it is the duty of the Crown to protect the subject, can file an information of this nature. And every part of this case must be looked at not merely with a view to the question, whether there are not many parts with respect to which the Attorney-General would not have a right to file such an information, but whether there are not some in respect of which he would have such a right. In that view this case is extremely important; for I agree with Mr. Leach that it is not my business to determine whether the Legislature should pass acts to give relief to persons who have no remedy, but I sit here to determine whether the Attorney-General can sue in this form under this act. The question does not depend merely on the true construction of the act of Parliament. If the demurrer was meant to take the opinion of the Court, whether, under this act, which gives the commissioners an authority to raise a sum not exceeding three shillings per chaldron on coals imported into *Brighton*, they have a right *de tempore in tempus*, and from year to year, to levy the rate not for the purpose which the act gave it, but for that to which in a certain case only they are authorised to apply the surplus, I should not hesitate to say that the construction of the act of Parliament, which the commissioners have put upon it, cannot be the true construction. I apprehend that the two acts mean this; not that the duties to be raised for preserving these groynes are to be calculated with such extreme nicety that the commissioners should never have a farthing more raised than is necessary for that purpose, but that it would be a faithful discharge of their duty if they *bonâ fide* raise what they shall from time to time think necessary, and acting so *bonâ fide*, if they have not raised enough, they have power of raising


1818.  
  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 BROWN.

1818.  
  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 BROWN.

more, and if there is too much after they have paid off every debt or demand to which they are liable, the accidental surplus which remains is that which they are at liberty to give to the rates of the town, raised for the purpose of paving, watching, and lighting. If that therefore is to be taken as a ground of demurrer, my opinion at this moment would be that the demurrer would not hold.

Another point is most material, and it is this: Whether the Attorney-General can call for the interposition of the Court, first, on the ground of restraint, to prevent the money from being hereafter devoted to other purposes than those for which it was granted: secondly, of account—and thirdly, of application to the purposes of the act. It is contended that this is not a charitable use; and I am not at present disposed so to consider it. But these two acts of Parliament being in *pari materia*, must be taken together. In the former part of the first act the commissioners are not described otherwise than as commissioners, and in the latter part they are not described by any other name than that of trustees. At present it appears to me, that unless this Court, as the matter stood on the first act, could have interposed, there would have been no remedy; for that act gave authority to raise the sixpence per chaldron without any controul; and if an application had been made to the Court of King's Bench for an information in the nature of a *quo warranto*, the act of Parliament would have been an answer. That Court could not order the application of the fund by the commissioners, as they are called in the former part, or the trustees, as they are termed in the latter part of the act. An important part of the case is that this duty of sixpence per chaldron, like the subsequent one of three shillings, is not a duty leviable merely on the inhabitants of *Brightelmstone*, but on all the King's subjects who resort to that place for the purpose of selling coals, whether the coals are conveyed

veyed thither by land or water. It is true that the duty is in effect to be repaid by the inhabitants who shall afterwards purchase the coal; and being so repaid by the inhabitants, they would be obliged to reimburse to the full extent those who had paid the duty; but it is not *eo nomine* a duty on the inhabitants of *Brighton*, but a duty on all the King's subjects resorting to that place. It is a duty however to which they are liable only for a particular purpose, and a duty which, if I am right in the *notion* I have of this act of Parliament, is a duty only to be raised to the extent authorised by the act; and every one of the King's subjects has a right to say in some Court that it is a duty which shall not be raised beyond that extent. The second act recites the former, and gives the power of increasing the duties to an extent not exceeding three shillings per chaldron. The question then will in its result be one with respect to which there is a good deal of implied, and perhaps some positive authority, (for I do not admit that there is not some positive authority), namely, whether, when a duty of this sort is raised on all the King's subjects—a duty affecting their trade, and the persons authorised to raise that duty for special and limited purposes are raising it for purposes which do not fall within the powers granted—the public, and the Crown in regard to its duties to the public, have not an interest in preventing the raising the fund for undue purposes, or the misapplication of it when raised for due purposes; and whether the interest of the Crown is not such an interest as will authorise the Attorney-General to come into this Court to prevent the misapplication. I have already stated it to be an important consideration that this is not a duty imposed on the inhabitants of *Brighton* only. But if it was a duty imposed solely on them, I am not prepared to say there would not be a public interest in preventing its misapplication. It is a duty on all the King's subjects. The question then is, what will authority or precedent require a Court of Equity to do? I do not

1818.  
  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 BROWN.

1818.  
  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 BROWN.

know whether the case was looked at with this view before the Vice-Chancellor. I shall however feel it to be my duty not only to know the grounds of his Honour's judgment, but also to consider the case as it has now been argued at the bar, and with the view I have alluded to.

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November 25.

*The* LORD CHANCELLOR. This is a case on which I have reflected with much anxiety; for it appears to me that if the Attorney-General is right in the construction he puts on the acts of Parliament relative to the town of *Brighton*, it will be very difficult to find an adequate remedy for the misapplication of the money collected for the coal duty, if an information of this kind cannot be supported. [His Lordship then stated the act of the 13 Geo. 3.]

With regard to the power of distraining given by this act, it has been thought that if there is a right of distress, the party distrained upon might replevy, and that it would therefore be difficult to maintain a suit in this Court. But it seems to me that more weight is laid on that observation than belongs to it; for the question would be, with regard to the groyns, not whether the party could replevy if improperly distrained upon, but attending to the whole matter in the information, whether what has been rightly levied can be compelled to be properly applied. If on a distress the goods should be replevied, and if the question was decided against the party replevying, it would merely be a decision that he was liable to pay the duty; but the point which the Attorney-General has to establish here against those who have received the duty, is, that when paid, it shall be applied to the purposes of the act, and no others.

One great question is, whether this act of Parliament did in respect to this coal duty create a charitable use. It seems to have been considered that because the duty was granted by act of Parliament, it could not be a charitable use. If  
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authority was wanted on this subject, it would be sufficient for me to state, that in *Duke's* exposition of the statute of *Elizabeth*, after speaking of the sense in which we understand the terms "Donor" and "Donee," he goes on to state that any imposition on commodities imported or transported, to be employed in the repair of ports and havens, is a charitable use, and within the statute. Supposing that after the fire of *London*, when acts of Parliament for the purpose of rebuilding *St. Paul's Cathedral*, imposed a duty on all coals imported into the *Thames*, can there be a doubt that it was a charitable use? There is no doubt that money given by a donor for repairing a church or chapel is a charitable use; and if this be law, there is no reason why money given by the public, if it is applied to a charitable purpose, should not be equally within the statute of *Elizabeth*.

1818.  
 ~~~~~  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 BROWN.

[His Lordship then stated the act of the 50 *Geo. 3.*]

With respect to the clause directing that all suits shall be brought against the treasurer—there are many cases which might be the cause of suit against the commissioners *qua* commissioners; for the treasurer cannot be proceeded against where the act cannot be the act of the treasurer; for instance, suppose the commissioners take possession of the place where the market is to be enlarged: that would be a case in which the Court is in the habit of granting an injunction; but the suit must be against the commissioners, and not the treasurer.

The terms of the clause empowering the commissioners to impose the duty on coals do not accurately point at the making an annual rate; but it appears that the construction of it has led to the making an annual rate; and on the whole it is the best construction of the act. Taking all the provisions together, it appears to me that the rate was intended to

1818.

~  
The  
ATTORNEY-  
GENERAL  
v.  
BROWN.

to be annual. The object makes it fit that it should be varied and altered; for it is not a power and requisition to the commissioners, enabling and requiring them every year to raise three shillings for the purposes of the act, but only enabling and requiring them to raise a duty not exceeding three shillings; and if the necessities of the coast required more, they had no power to raise it. But the question is, whether, if the necessities of the coast do not require more than one shilling, they have any authority to raise three shillings.

It has been argued on the clause enabling the churchwardens and overseers of the poor to grant a drawback of the duty to poor persons, provided the drawback be not allowed to any such person for more than two chaldrons in a year, that because the poor are not to pay the duty, therefore this is not a charitable use. But this does not appear to me to be the consequence. It does not follow that they are not to pay the duty if they have more than two chaldrons of coals in one year: and I cannot find from any authority that it is necessary that the poor should be called upon.

The construction contended for by the information is, that the commissioners were authorised, in case circumstances required, not to levy a rate of three shillings on every chaldron of coals brought to *Brighton* either by sea or land, but a rate not exceeding three shillings, and for the purpose of supporting the fences and groynes which were to make the harbour accessible, and to preserve the town. In making such a rate according to what is contended for in the information, it being impossible to calculate the exact sum which might be necessary in the course of a year, it was therefore considered that there might be some surplus if the act was executed *bonâ fide*, and that the casual surplus should be applied in aid of lighting, paving, and watching the town. On the other hand, if the duty fell so far short as not to

answer

answer the purposes for which it was to be raised, they were authorised to borrow 5000*l.*, having put in a course of discharge the 1140*l.* by mortgaging the duty on coals. Having mortgaged such duties, then if there should be an occasional surplus from year to year, such surplus was to be applied first to the payment of the debt; and when the debt was paid, if the amount of the rate should be collected and applied according to the purposes for which it was made, namely, to keep up the fences and groynes, and towards paving, watching, and lighting the town.

Now although there was no occasional surplus applicable to the payment of the debt, yet with a view to meet the expenditure for paving and lighting the town, the rate has been applied to those purposes instead of being applied first to the payment of the debt; and the Attorney-General has charged that it is contrary to the duty of the commissioners to raise this rate or collect it in any other manner than as directed by the act. But supposing that this should be considered matter of offence to be answered for otherwise than civilly, this is not a demurrer which proceeds on that ground: nor if it had proceeded on that ground could it have been sustained, first, because it is a sufficient answer, that although the Attorney-General chooses to sue civilly, he may take care that no other person shall sue criminally; and secondly, that if the Attorney-General can prove his case without introducing any criminal matter, he would be entitled to a decree.

There is another ground of demurrer which has been stated *ore tenus*, which if it could be sustained would dispose of this information without entering into any other consideration—that there is a want of parties. I am inclined to think there is a want of parties; but if that objection can be overcome, I should wish this case to be again spoken to by one Counsel on each side; for I cannot bring myself to the conclusion

1818.  
  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 BROWN.



1818.  
 ~~~~~  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 BROWN.

conclusion that this is not a charitable use: and if it is a charitable use, it appears to me that the Attorney-General may support such an information. In that point of view, it becomes necessary to see what are the various objects of the prayer of this information; for when those various objects are examined, it seems impossible to contend, that because the individual may have a remedy, the Attorney-General can have no ground of complaint for the misapplication of the duties to be raised, and which are devoted to that which, on the authority to which I have alluded, may be deemed a charitable purpose.

[His Lordship then stated the substance of the information.]

With respect to that part of the prayer which asks for a declaration of the law, if it is part of my duty to say what is the meaning of an act of Parliament, I have no doubt in saying the meaning was that the commissioners should only apply the occasional surplus which a miscalculation of the rates for repairs of the groynes might have produced, for the surplus could not be returned to the individuals; and therefore it was thought convenient that it should be applied to another purpose. But it was never the meaning of the act, that under colour of the coal duty, they should levy a duty for paving and lighting the town any more than for the support of the poor. It would be difficult to decide on the question, whether they should be restrained, unless there was satisfactory evidence that there had been this abuse, and that a repetition of it was meditated; but if this duty can be considered as a duty subject to a charitable use, on what ground can it be said that the Attorney-General cannot come into this Court to have an account of the duty, to know how it has been applied, and to have directions for its future application, in the ordinary way in which he comes to this Court

Court for other charitable purposes? Unless therefore I hear more to convince me of the contrary, my opinion is, that this is a charitable use within the statute of *Elizabeth*. I cannot however at present overcome the objection for want of parties. The present commissioners are the only defendants, whereas the accounts prayed go back to a period at which there is no averment that they were the acting commissioners, and when in all probability they were not.

1818.  
The  
ATTORNEY-  
GENERAL  
v.  
BROWN.

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On this day the case was again argued.

1817,  
December 24.

Mr. *Leach* in support of the demurrer. The ground of this demurrer is that this Court has no jurisdiction; and that if the commissioners had acted illegally under colour of the authority given to them by the Legislature, this is not the Court that has the Police of the country under its direction. This principle does not appear to be disputed by the relator. It is said however that although this is not a Court of Police, yet it has the correction of charitable uses; and that the money to be raised by the duty on coal is in the nature of a charitable use; and that this Court has therefore the power to call upon the commissioners so correct their misapplication of the money, which ought to have been applied to other charitable purposes. Conceding, for the sake of argument, that this ought to be considered a charitable use, and that these commissioners are to be considered as trustees for charitable purposes, is this an information by which the Court is called on to correct the misapplication of the funds due to such charitable purposes, or should it not have been an information of an entirely different nature? This information does not pretend that the commissioners have employed to the purposes of the town rate that which could have been applied for maintaining the groynes, as those purposes were

1818.  
 ~~~~~  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 BROWN.

called for. So that in truth there has been no charitable use neglected. That is not the complaint of this information. It does not say that the commissioners ought to have applied the money to maintain the groyns, or that they had employed it in aid of the town rate. That is not the nature of the complaint. What the information alledges is that this money, which is the excess of the rate beyond what was required for the purpose of maintaining the groyns, has been illegally levied. The complaint is not that the commissioners have employed what ought to have been applied to charitable uses, but that under colour of an authority given to them by an act of Parliament, they have illegally exercised the authority vested in them, and have received money that ought never to have been received. This is not an information which is to correct the misapplication of the funds of a charity, but it complains that money has been raised which ought not to have been raised. The complaint is not the misapplication of a charitable trust, but that under the purposes of a charitable trust the commissioners have illegally raised money on the subject. It is therefore an information to correct the illegal levy of money on the subject; and if so; I contend that it is not within the jurisdiction of this Court, even admitting that it is a charitable use. Upon the important question, whether this can be considered as a charitable use, the argument in support of this information has been, that it is a charitable use, because it is for repairing the groyns and sea walls of that part of the coast, which is said to be one of the purposes enumerated in the statute of *Elizabeth*. To answer that argument it is necessary to look at the preamble of that statute, which recites that lands, stocks, &c. have been heretofore "given, limited, appointed, and assigned, as well by the Queen and her progenitors as by sundry other well-disposed persons," for the several purposes enumerated. The question is, whether this is property which is "given, limited, appointed, and assigned," for the purpose

purpose of a charitable use. These words are terms of gift. Though these terms are applied to this particular species of property, yet the whole aspect of the statute is that it shall be property given to a charitable use, which shall alone be placed under the protection of the statute. Is then this duty of three shillings a chaldron on coals brought to *Brighton* which the commissioners are enabled to levy, and which is given for the purpose of maintaining the groynes and sea fences, to be considered as a gift for a charitable use? Who ought to pay this duty? Those for whose benefit it is levied. It is for the purpose of enabling the commissioners to preserve the coasts. It is a toll for regulating the market; for building and repairing groynes to render the coast safe and commodious for landing coal and culm. A certain expence is to be paid for the purpose of landing in *Brighton* sea coal and culm. That part of the coast being extremely inconvenient for landing any thing else, it was for the purpose of rendering the coast more safe and commodious for landing coal that this act was passed. Who then ought reasonably to bear the expence? Those persons who are to be benefited by the convenience. The act provides that the importers of coal shall pay a duty on the coal landed on this part of the coast. In what sense then can this be considered as a gift? Is it any thing more than a contribution on those who are to enjoy the convenience? If it is a charitable use to any one, it is to those who import the coal, and for whose benefit the expence is incurred, after paying the charge. When the principle is examined, it is not possible that this can be stated to be a charitable use. In order to repair the groynes and sea walls, the importers are to pay the expence by a duty of so much per chaldron. Is that a charity? Is it any thing which is given by any one? It is merely a mode of contribution which the act provides among those for whose benefit the expence is incurred. Is it any thing more than if there had been no act of Parliament, but some persons  
had

1818.

W  
The  
ATTORNEY-  
GENERAL  
v.  
BROWN.

1818.

~  
The  
ATTORNEY-  
GENERAL  
v.  
BROWN.

had met, and by subscription voluntarily levied the expences upon themselves? Would any person call that a charity given to the importers of coal which came out of their own pockets? There can be no difference, whether the subscription is by voluntary agreement, or by the mode marked out by the act. It can no more be considered a charitable use than the poor's rates can be so considered. If the money raised to defray a charge of this nature is a charitable use, every shilling raised by the poor's rates is a charitable use; for it is a contribution by which the inhabitants of a parish are to maintain their poor. It is a contribution imposed by the Legislature. If your Lordship has a jurisdiction of this kind over the commissioners, you have a similar jurisdiction over every overseer of the poor.

The remaining objection is one which was taken *ore tenus* for want of parties. The defendants are in the information styled "the acting commissioners." The question is, whether, in this state of the record, the Court will, by acceding to the prayer, do complete justice in this case. The objection proceeds on the ground that the Court cannot effectually do that which is the object of this information. There are persons not present who are to be affected by the relief to be given, but who will not be bound by the decree. On the contrary, they may immediately afterwards offend in the same manner and in the same rights as those persons who are now defendants. This is an application merely to restrain the acting commissioners. Supposing the acting commissioners to be restrained, there may be many commissioners who have not yet acted, but who may immediately act, having first taken the prescribed oath of qualification. The Legislature means that those should be considered as the acting commissioners who have taken a share in any of the resolutions of that body. They are collectively to exercise the authority of commissioners. The persons who have not yet acted, but who may immediately qualify themselves, would not be restrained by  
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your Lordship's decree. Any person subsequently qualifying himself may, according to the language of the injunction, act in opposition to it with impunity. Can it then be possible that a Court of Justice is to be called upon to give such ineffectual relief to-day, when to-morrow the same thing may be done by a competent authority? For the act merely requires that there shall be thirteen commissioners to do certain acts. Thirteen commissioners, not parties to this suit, may therefore do the very acts to be prohibited by the injunction of the Court.

1818.  
  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 BROWN.

*Mr. Bell* in support of the information. It does not follow that although the commissioners, if they have acted illegally, may be proceeded against criminally, they cannot be called on in a suit instituted in this Court. It has been frequently matter of observation here that many subjects of which this Court takes cognizance approach so near to the offence of conspiracy, that it would be difficult to say that a Criminal Court would not take notice of them. In the present case we contend that it was not necessary for the commissioners to raise this money, but that whether necessary or not, they have misapplied it in the various instances stated in the information. No authority has been quoted to shew that this is an indictable offence. The case is merely that the commissioners have raised money to be applied to one purpose, and have improperly applied it to another. This is an information for the purpose of having money which has been received by these commissioners, accounted for and applied to the uses to which it ought to have been applied, and for restraining the commissioners from raising more till they have applied what is in their hands. Unless they can shew that the rates are wanted for the repair of the groyns and sea fences, they have no right to levy them; but if they have levied money for the purpose, and have not so expended it, they cannot be indicted for a criminal offence by anticipation.

The

1818.  
  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 BROWN.

The gist of this application is to make them account for that which they have received and misapplied. In one class of cases, (more usual formerly than of late years), where bills of exchange have been obtained from young men and negotiated, the bills filed for relief against such transactions stated the fact of a conspiracy; alledging that the parties, under pretence of furnishing money which they never furnished, had obtained the securities. It might be difficult to say that in cases of this description, the transaction might not be punished as a conspiracy; but this Court would not hold that on account of such a probability, the party who should file his bill here ought not to have relief.

*The LORD CHANCELLOR.* If a man makes a voluntary conveyance to defraud his creditors, he is by statute (a) liable to imprisonment.

*In support of the Information.* But the argument on the other side, if well founded, would be no answer to this information; for this is a general demurrer to discovery and relief; and a demurrer to the whole bill must cover the whole bill. This is an information against the commissioners to compel them to apply the money in the manner in which it is properly applicable.

But it is contended that this is not money given to a charitable use. The statute of *Elizabeth* expressly mentions, among the cases of charitable uses, repairs of ports, havens, and sea banks. If this was money raised for the repairs of sea banks, it ought not to have been applied to any other purpose. If an individual had given an estate in trust to apply the rents in the repairs of the groyns, that would no doubt have been a charitable use; but it is contended that this being money granted by act of Parliament, it is therefore not a charitable use. But it is impossible that there can be

(a) 13 Eliz. c. 5.


any such distinction. Many of the schools in this kingdom are founded by act of Parliament. The school at *Berkhamstead*, in particular, was established by an act of Parliament, which also settled lands for its support. It is immaterial whether the lands are given by act of Parliament, or by the King. The authority to which your Lordship referred on a former day is decisive on the point that an imposition on commodities transported, to be laid out in the repair of ports, &c. is as much a charitable use as when an estate is given. But an imposition on commodities imported or transported can only be granted by act of Parliament. It is said that this is not a charitable use, but a contribution: that certain persons imposed duties on themselves for the express purpose of contributing towards that which was for their own benefit. But the persons bringing coals to *Brighton*, though materially interested in the support of the groynes, are not the only persons interested; for the effect of the groynes being to protect the coast against inundation, all the inhabitants and land owners of the town and neighbourhood have an important interest in their preservation. The money is not merely granted to repair the beach, and make it accessible to vessels bringing coal, but to prevent the inroads of the sea. But if it was merely a contribution, it would not on that account be out of the operation of the statute; the question would still be, whether it be a contribution for a charitable use. It is said that if the Court has jurisdiction in this case, it must have jurisdiction in cases of misapplication of the poor's rates. But the misapplication of those rates has been provided for by the Legislature, and the remedies have been found effectual.

With respect to the objection for want of parties, it has never been considered that when a demurrer is heard and allowed, and is brought before the Court on appeal, the Court can look to any thing but the record. The ancient practice was to dispose of one demurrer first; and if the Court allowed it, there was an end of the case, unless there

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1818.  
The  
ATTORNEY-  
GENERAL  
v.  
BROWN.



1818.  
  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 BROWN.

was an appeal; but it was never supposed that a second demurrer could be allowed till the first was disallowed; and if the first was disallowed the other might be argued. It is important that this should be the case when there is an appeal; for if the first demurrer was allowed it was never thought worth while to discuss the other question. It would always have been a question, whether the Court would not give leave to amend by adding parties. Lord *Redesdale* observes that it was always necessary that a demurrer for want of parties should point out the proper parties, not indeed *nominatim*, but so as to enable the plaintiff effectually to amend. For that reason, the propriety of permitting a defendant to demur *ore tenus* for want of parties may be questioned. But there is no want of parties here. The statement in the information that the acting commissioners "were and are" the defendants, is a sufficient averment that there are no other commissioners who have qualified pursuant to the provisions of the act; and if the information is to be met by an objection for want of parties, the objection cannot be by demurrer, but by plea, stating that there are other commissioners who have qualified. We are not bound to bring before the Court commissioners who have not qualified; for if we had, (by analogy to the rule established by Lord *Alvanley* respecting executors who have not acted, and which has long been the settled law of the Court), the information would have been dismissed against them with costs. It is said that the injunction would be nugatory as against commissioners who may subsequently qualify: but a similar objection might be made to an injunction granted in a suit against acting executors, in a case where there are others who not having acted are not made parties, but who may afterwards take upon them the executorship; but this has never been considered a reason for the Court's not interfering. The treasurer is a party, and he is competent to represent the whole body of commissioners if necessary.

*The LORD CHANCELLOR.* This is a suit instituted by information filed by the Attorney-General against commissioners appointed under the acts of Parliament to which I shall have occasion particularly to refer. In the 13th year of his present Majesty's reign, an act was passed for paving, lighting, and cleansing the streets of the town of *Brighthelmstone*, by which act certain persons were appointed commissioners for carrying the act into execution. It contains a provision, that actions may be maintained in the name of one commissioner, or of the clerk or treasurer, and after a variety of clauses for effecting the several objects of the act, it is further provided that it shall be lawful for the commissioners, or any seven or more of them, in every year after the passing of the act, or oftener, if they, or any seven or more of them shall think it necessary, to make one or more rate or rates to be signed by any seven or more of them, upon the tenants or occupiers of all houses, &c. in the town, so as such rates should not exceed in the whole, in any one year, the sum of three shillings in the pound, according to the rate made for the relief of the poor of the town. It then states the manner in which the parties shall be compelled to pay the rates, and provides for the inspection of the poor's rates, by any person having obtained an order under the hands of the commissioners, or any five of them, and it imposes penalties on those, who, having the custody of the rate, shall refuse to permit it to be inspected, or copies of it to be taken. According to this act, the inhabitants of *Brighton* are made liable to the payment of a rate for paving and lighting, not exceeding three shillings in the pound, according to the rate made for the relief of the poor of the town; but the overseers are not to be called upon to shew the poor's rate, unless to a person authorized by five commissioners to inspect it. The rate was not to be unnecessarily made three shillings in the pound, and not unnecessarily made greater than the magnitude of the case called for. After various clauses for keeping the town in

1818.

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The  
ATTORNEY-  
GENERAL  
v.  
BROWN.  
April 3.

1818.  
 ~~~~~  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 BROWN.

order, and regulating the proceedings of the commissioners, their treasurer and clerk, there is a clause enabling the commissioners to borrow money, and directing in what manner the securities should be made. It is in this part of the act that the first mention is made of building and repairing groynes. The act contains a recital, "that the town of *Brighthelmstone* is situate by the sea side, and within six miles of the port or harbour of *Shoreham*, that great part of the town having been destroyed by the breaking in of the sea, several groynes (by which I understand buttresses, erected for the purpose of keeping up the shore) were some years since erected, which had preserved the town, and that the coast was then safe and commodious at several times of the year for unloading and loading sea coal, culm, and other coal, on the beach of the town for the use of the inhabitants thereof." And that the groynes were become greatly out of repair, "*and the inhabitants of the said town are not able to raise money sufficient to repair the same, without the aid and authority of Parliament;*" the act then proceeds to enact, that the commissioners, or any seven or more of them, should be "trustees," for repairing and preserving the groynes, and erecting any new groynes, at such times and in such manner as to them, or any seven or more of them, at any general meeting assembled for putting in execution the powers given by the act, should seem most proper; and that the trustees, or any seven or more of them, might direct all things to be done which should be necessary for the repairing the groynes and other works, according to the true intent of the act. It proceeds to enact, that for better effecting the support of the premises, there should, from the 24th of *June*, 1773, be paid to the trustees and their successors, or to such persons as they, or any seven or more of them should appoint, as their receivers, sixpence for every chaldron of sea coal, &c. that should be landed on the beach of the coast, at the town of *Brighthelmstone*. There is one other clause which it is necessary  
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to notice; I allude to the clause which enacts that it shall be lawful for the trustees, or any seven or more of them; by indenture or writing, under their hands and seals, to assign the rate granted by the act, as a security for any sum or sums of money by them to be borrowed for the purposes of the act; not exceeding 1500*l*.

1818.  
The  
ATTORNEY-  
GENERAL  
v.  
BROWN.

This act continued in force till the year 1810, when another act was passed, the provisions of which I shall have occasion to consider. It contains a recital of the insufficiency of the former rate to preserve the groynes from going to ruin by the breaches of the sea, and certain individuals were constituted trustees or commissioners, who were authorized and required to repair and maintain the groynes, or to cause new ones to be made, which might appear necessary for the safety of the town, or any part of the shore; and that from the passing of the act, there should be paid to the commissioners, or their collector, any rate which the commissioners should think fit to direct, not exceeding three shillings for every chaldron of sea coal, &c. landed on the beach, or brought by land carriage or otherwise, within the limits of the town. This duty the commissioners were empowered to raise for the purposes of applying it for the preservation of the groynes, which the inhabitants state themselves to have been unable to protect from the ravages of the sea.

It appears to me, that there must exist in some Court in this kingdom, a jurisdiction to prevent the misapplication of monies raised under the authority of this act. I am unable to satisfy myself; considering the recital which precedes the authority given to the trustees, that this case does not come within the doctrine of charitable uses. The intention certainly is to provide for the preservation of the town from the ravages of the sea, by property set apart for the purpose of aiding the pecuniary inability of the inhabitants.

1818.  
  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 BROWN.

The sum authorized to be raised under the former act, being insufficient, there was no possibility of effecting the purposes in view, till the making of the second act.

The second act contains a clause, providing that the commissioners may bring and defend actions in the name of their treasurer; that they shall cause books to be kept for entering their proceedings, and an account of all monies raised under the act, and which books are to be open to the inspection of all persons interested. It also authorizes the commissioners to make rates on the occupiers of hereditaments, not exceeding in one year, four shillings in the pound, on the scale on which the poor's rates are raised. The act contains clauses providing for the inspection of books; and after giving power to raise monies on the credit of the market, it directs, that after the monies due, or to be borrowed upon the credit of the market, or the repts, tolls, and profits, should be fully paid and satisfied, the commissioners should apply any surplus to arise from the market, either in aid of the rate for paving, lighting, and watching, or of the duty afterwards laid upon coals. The act afterwards proceeds to enlarge the power given to the commissioners by the former act, with respect to the sum of money which they were enabled to raise, for erecting and repairing the groynes, and which, by the first act, was fixed at sixpence per chaldron on coals, but is increased by the second, yet was not to exceed three shillings per chaldron.

In my view of this act, it is nothing more than a continuance and enlargement of the provisions of the former, authorizing the Commissioners to raise an augmented proportion of duty, on account of the inability of the inhabitants of the town, which is recited as the ground of the first act. It is clear that the inhabitants were unable, and the former duty insufficient to repair the works, when they called  
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upon the Legislature to give to the commissioners the extended powers of the second act, of raising any duty on coals and culm brought into the town, not exceeding three shillings per chaldron, not, however, to the extent which might appear to them to be necessary, requisite, and proper, generally speaking, but to the extent which might appear to them to be necessary, requisite, and proper "for the safety of the said town, or of any part of the shore within the said town." It might have seemed to them to be proper, without being necessary and requisite to the safety of the town. But the act leaves them no discretion on that point; they are expressly limited to what shall appear necessary, requisite, and proper "for the safety of the town." To judge and determine with absolute precision what should be necessary or proper would be impossible, for that which might appear necessary and proper at one time for guarding against the ravages of the sea, might at another time appear totally inadequate for that purpose, as the ravages of the sea might occasion additional damage to the works immediately after the commissioners had made their estimate and calculation. In this view of the subject, it is impossible to say what might or might not be an adequate sum; but at all events the commissioners were not to raise more than three shillings, so that if they were to raise the whole three shillings, it is not improbable that less than three shillings might have been sufficient.

1818.  
The  
ATTORNEY-  
GENERAL  
v.  
BROWN.

On these two acts of Parliament an information has been filed by the Attorney-General, at the relation of *Izard*, a coal merchant, and an inhabitant of *Brighton*; and for the purpose of considering what is to be done with the demurrer which has been filed, I must assume all the facts stated in the information to be true. The information prays for relief, and the demurrer is to the whole of the information; if the Attorney-General has shewn a title to the slightest part of the relief, the demurrer cannot be allowed. The  
information

1818.  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 BROWN.

information states, that the commissioners, at a meeting held on the 2d of *May*, 1810, directed, that from that day until the 1st of *May*, 1811, the duty on coal and culm should be three shillings per chaldron; and at other meetings of the said commissioners, or of the greatest part of them, held in the year 1811, and in the three following years, it was resolved, that the duty should be continued at three shillings until the 1st of *May*, 1815; that the duty was accordingly levied, and after payment of the interest which accrued due on the debt of 1140*l.*, the residue of the debt of 1500*l.* (mentioned in the first act) contracted on the credit of the former duty on coals, and of all the expences incurred in erecting or repairing groynes under the acts, there was, at the end of each of the said years, a very large surplus of the monies arising from the coal duty, and that such surplus, on the 29th of *November*, 1813, amounted to 4808*l.* 15*s.* 7*d.* The information proceeds to allege, that as there was a debt of 1140*l.* due on the coal duty, the commissioners ought to have applied a sufficient part of the surplus in payment of the debt of 1140*l.* How it can be contended that this was not the duty of the commissioners, and that they ought not to have paid off this money, assuming the facts stated in the information to be true, is to me quite incomprehensible. Whether I have a power adequate to enforce that duty, is a different question. It was argued, that taking the facts to be true, the commissioners were charged with criminal acts, and therefore that no proceedings could be instituted against them here. But it must be recollected, that a person liable to account, cannot protect himself in this Court from accounting, merely because the liability to account is mixed with duties of another kind. If there be any part of the information, the answer to which might shew criminality in the defendants, it is in the power of the commissioners to put in an answer, in which they may distinguish such part of the information as they may think hazardous, but they cannot refuse to answer the other parts of the information, which do not expose them

them to the same inconvenience. Instead of applying the monies which the commissioners were authorized to levy, as they were always bound to apply them, for the purpose of erecting and repairing the groynes, they not only do not apply the surplus to the reduction of the existing debt, but have actually increased the debt by borrowing more money. I must then take it to be true, for the purposes of argument, that the commissioners have, every year from the passing of the said act, *up to the present time*, misapplied a very considerable part of the money arising from the duty on sea coal, culm, and other coal; and the question is, what the Court can do, supposing it to be a fact. How is it possible to contend, if the circumstances so charged in the information be true, that the commissioners have proceeded to the due execution of the act of Parliament according to its true intent and meaning? Supposing these facts to be true, can it be contended, that under an act of Parliament which authorises the imposition of a duty on coals for a specific purpose, a great part of that duty can be applied to the relief of the paving rate, while the original debt contracted under the act of the 18th of the King remained unpaid, and while the debt contracted under the act of 1810 remained unpaid? It is directly contrary to the act of Parliament. If my construction of the act of Parliament be the true one, the commissioners must be considered as trustees, and laying out of the case every thing that has been said in other respects, and looking only at the allegation that there is a balance in their hands, and that part of the prayer which asks for relief respecting that balance, there can be no question that this Court could have a jurisdiction. That circumstance alone would have been sufficient if all the rest of the information had been struck out. One ground taken by the argument in support of the demurrer has been, that many parts of the information allege acts of criminality on the part of the defendants. But after looking repeatedly at the information, although there may be some parts which may  
be

1818.  
The  
ATTORNEY-  
GENERAL  
v.  
BROWN.



1818.  
 ~~~~~  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 BROWN.

be so considered, and to which the defendants might not have been bound to give an answer, yet they cannot on that ground protect themselves against an answer by demurring to the whole information. A demurrer to the whole of an information or bill, cannot be supported, although the bill contains matters to which the Court would not compel an answer, if it also contains matters having no such tendency. Would it be possible to contend, that the Attorney-General has not the power, under the circumstances which are stated in the information, to call upon the defendants to make a discovery of the misapplication with which they are charged?


It has been considered as mischievous for the Attorney-General to come in aid of the relator with respect to the distress. But if the relator is not allowed to require the assistance of the Attorney-General, it will not relieve the defendant from the obligation of answering the information on the other points. If the information can be maintained by the Attorney-General, the circumstance of his having joined with a person who is not entitled to the equitable relief he seeks, will not make the proceedings vicious; as has been lately determined in a case before the House of Lords.

Another ground insisted on in support of the demurrer, is, that there is a defect of parties. My opinion is, that there is no foundation for this objection. It must be fully apparent, that if the information can be supported as the information of the Attorney-General, and if the acts complained of are the acts of the commissioners, they are the proper parties to the suit. It may certainly be a great obstacle to the successful prosecution of the suit, that those persons who are the acting commissioners to-day, may not be the acting commissioners to-morrow, but as commissioners they may be obliged to bring forward, from time to time, those accounts for which they were originally brought

brought here, and the act having provided the mode in which their successors are to be appointed, when the Attorney-General requires an injunction against the body thus formed, the suit can certainly be maintained against them, if there be any grounds for maintaining it at all. If the Attorney-General can maintain the information, the parties may be changed from time to time. This part of the case may occasion considerable difficulty in the further prosecution of the suit, but it is *no objection* to its progress. I think that the argument that the treasurer should have been the sole defendant, cannot be supported; the directions in the act of Parliament do not apply to such a case as this, where the relief sought cannot be obtained by any process against the treasurer.

1818.  
The  
ATTORNEY-  
GENERAL  
v.  
BROWN.

I now come to the most material question, whether this is a case in which the Attorney-General can sue? On the best consideration, and looking to the view which has been taken of the case elsewhere, I think that this is a case in which the Attorney-General may sustain an information. The first act of Parliament authorized the making of rates for the preservation of the coast, in consequence of the inhabitants having represented themselves to Parliament as persons too poor to make the necessary provision with their own monies. Certain persons were appointed by that act as trustees, for the purpose of levying and applying the rates; and if the question had arisen between the passing of the first and second acts, it could not have been contended that the persons nominated as commissioners were any thing else than trustees, for the purpose of applying the sum which they were authorized to raise; and though the language of the second act is much more full and comprehensive, I think the two acts must be construed together. The second must be considered as supplementary to, and not as negating the provisions of the first. The commissioners under the second act are authorized to raise a larger sum, but I think they are invested with the same character as those

1818.  
  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 BROWN.

those who were appointed under the first act of Parliament. On this part of the case a passage has been referred to in *Duke's Law of Charitable Uses*, a work of good authority. The passage cited, is from the readings of Sir *Francis Moor*, and is the construction put on the statute of charitable uses by the person who drew it. It shews, that in his opinion a parliamentary grant of this sort is a charitable use within the meaning of the statute:—

“*Ports and Havens*:” “such only as tend to safety of ships  
 “of sail, not other vessels; and creeks of harbour, which  
 “are employed to find lights to guide ships into the haven,  
 “is a charitable use within these words. An imposition  
 “granted upon commodities imported or transported, to be  
 “employed upon repair of ports or havens where they  
 “shall land, is a charitable use, and within this statute (a).”

I should be glad to know whether duties imposed for assisting the poor inhabitants of *Brighton* to raise and maintain groyns for the preservation of the town, and enabling ships to land commodities there, is not within this construction of the statute. I have heard nothing from the bar to convince me that the grant made by the act of Parliament now under consideration, is not a gift to charitable uses (b).

Demurrer over-ruled.

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The defendants afterwards appealed to the House of Lords, but the appeal was never argued, the relator having consented to the dismissal of the information, on payment of costs as between solicitor and client.

(a) *Duke* 129. [*Bridgman's* edit.]

(b) The arguments and judgment are given from the notes of a short

hand writer, the reporter not having been present during any part of the proceedings in this cause.

The

1818.

The ATTORNEY-GENERAL, at the Relation of  
EDMUNDS and Others, surviving Trustees of  
FOLJAMBE'S CHARITY, v. Sir JOHN BOR-  
LASE WARREN.

ROLLS.  
July 10, 14, 15,  
16.

**G**ODFREY *Foljambe*, by his will dated the 24th of February, in the 57th year of the reign of Queen Elizabeth, devised unto *Isabell* his wife, and her heirs for ever, all that the rectory and parsonage of *Adenborough*, otherwise *Adenburgh*, in *Nottinghamshire*, and all the glebe lands, oblations, obventions, commodities, and profits to the same rectory and parsonage belonging; upon trust that she, her heirs or assigns, should yearly, for ever (after the expiration of such interest or term of years, as *George Foljambe* the testator's uncle had in the said rectory or parsonage, of the bequest or grant of Sir *James Foljambe*, Kpt. deceased, grandfather to the testator) pay the sum of 40*l.* out of the revenue and receipts of the rectory, and of the other hereditaments in the will mentioned, to the Preacher of *Chesierfield*, in *Derbyshire*, for the time being; and also that she, her heirs or assigns, should pay the further sum of 13*l.* 6*s.* 8*d.* to the Schoolmaster at that place, and the sum of 20*l.* *per annum*, to the Master and Fellows of *Jesus College*, in the University of *Cambridge*, and to their successors for the time being for ever, and the further sum of 13*l.* 6*s.* 8*d.* to the Master and Fellows of *Magdalen College* in the said University, and to their successors for ever; and that the said *Isabell*, her heirs and assigns, should, from time to time give and employ all the overplus and residue of the rents, revenues, and profits of the said rectory, and of the other lands in the will mentioned, over and above the said sums, for and towards the relief of the poor, impotent, and needy

Information to set aside a lease for 980 years, of tithes belonging to a charity, dismissed: the lease having been granted 150 years before the information filed, and pursuant to a decree of this Court, which decree remained unreversed, and was not impeached or sought to be set aside by the present suit.

A lease of charity estates by the trustees for a long term, is not absolutely void; its validity must depend on all the circumstances of the transaction, and the difficulty of ascertaining those circumstances, and of restoring the lessee to his original situation, after the lapse of many years, is an impediment to the setting

aside such a lease in Equity.  
people,

1818.  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 WARREN.

people, for the time being, inhabiting within the several towns, villages, or hamlets of *Chesterfield*, *Brampton*, *Wingerworth*, and elsewhere, within the parish of *Chesterfield*, at the views and oversight of the executors of his will, and the survivor and survivors of them, and after the decease of all the executors thereof, then at the view and oversight of such person or persons as should be owner or owners of his Mansion-house called *Walton*.

In *Easter Term*, 1662, a bill was filed in this Court, by *Arthur Warren*, (an ancestor of the defendant) and *Hopton Shuter* and *Benjamin Weston*, his trustees, against the then trustees and impropiators of the rectory of *Adenburgh*, *Henry Foljambe*, the then tenant in possession of the rectory, the Masters and Fellows of *Jesus* and *Magdalen* Colleges, and the preacher, schoolmaster, churchwardens, and overseers of the poor of *Chesterfield*; stating the will and death of *Godfrey Foljambe*, that the estate of *Isabell Foljambe* in the rectory, was vested in *George Peirpoint* and others, and their heirs, upon the trusts aforesaid; that *Henry Foljambe* being tenant in possession of the rectory, and *Arthur Warren* being possessed of the manor of *Toton*, and divers arable, meadow, and pasture grounds in *Adenburgh*, for one thousand years, the reversion thereof being settled in the other plaintiffs *Weston* and *Shuter*, in trust for *Arthur Warren* and his heirs; and that there being tithes payable by the plaintiff, out of his manor and lands, to the impropiators of *Adenborough*, about *September* 1661, *Arthur Warren* treated with *Henry Foljambe*, the tenant in possession of the rectory, for the payment of a certain sum of money in lieu of the tithes due out of the lands of *Arthur Warren*, and for laying the lands belonging to the rectory, which were intermixed with *Arthur Warren's* lands, into several closes by themselves; and that thereupon it was agreed between *Arthur Warren* and *Henry Foljambe* that *Arthur Warren* should pay to *Henry Foljambe*, during his

his term in the rectory, 60*l.* *per annum*, for the tithes of *Toton*, and that the taxes should be equally borne between them, and that the glebe lands which were arable lands, lying in the fields of *Toton*, should be all laid together in one place of the said fields, next any side of the said fields, foot for foot, at the choice of *Henry Foljambe*, and that *Arthur Warren* was to fence them out, and the defendants, the trustees, to maintain the fence afterwards, and that such lands were to continue *tithe free* for ever to the said rectory, and that the meadow and pasture grounds belonging to the glebe in *Toton*, should be set forth and laid together as *Arthur Warren* and *Henry Foljambe* should agree, to remain in *severalty* for ever, *tithe free*; and that *Henry Foljambe* should have seven acres of land set out in *Toton Moor*, at that end toward *Chilwell*, to remain to the rectory for ever, in full satisfaction of all common or commons of pasture whatsoever, belonging to the rectory lying in *Toton*; and that *Henry Foljambe* should maintain the fence towards *Chilwell*, and the same towards the lane then made by the plaintiff; that *Arthur Warren* should divide that part of the *Holm Leyes* belonging to the rectory, which was staked out from the rest, and maintain all the fences of the same, for ever, and pay to *Henry Foljambe* forty shillings, and give him twenty loads of stone towards the making of a bridge over the river *Gowis*, and that he should divide the meadows belonging and laid out to the rectory from the vicar's lands, and that *Henry Foljambe* should have as much laid out for it, with a convenient way through the lands in the possession of *Thomas Comynes*, adjoining to the meadows; and further stating that the agreement was reduced into writing, and was to be confirmed by the trustees, and that they being therewith acquainted, and sensible of the advantage that would arise to the charitable uses thereby, they approved of the said agreement; and that pursuant to the agreement, *Arthur Warren* had laid out the arable lands in the fields of *Toton*, to the said rectory, foot for foot, and that all the

plaintiffs

1818.

The  
ATTORNEY-  
GENERAL  
v.  
WARREN.

1818.

~  
The  
ATTORNEY-  
GENERAL  
v.  
WARREN.

plaintiffs were willing they should be enjoyed to the rectory for ever; and that *Arthur Warren and Henry Foljambe* had in like manner set forth the meadow and pasture ground belonging to the rectory and parsonage in *Toton*, and that all the plaintiffs were willing that the arable meadow and pasture should be enjoyed with the rectory as the glebe thereof for ever; and that the seven acres of land in *Toton-Moor*, at the end towards *Chilwell*, were also set forth to remain to the rectory for ever, in lieu and satisfaction of all their common or commons of pasture belonging to the rectory in *Toton*; and that he had caused to be divided that part of the *Holme Leys* as it was then staked out, and that he had paid the forty shillings, and delivered the twenty loads of stone, and had caused the meadow to be divided from the vicar's lands, and had in all things else performed or was ready to perform the agreement, and had offered to convey some part of his manor and lands in *Toton*, and thereby offered that he and his trustees would, for that purpose, convey the mansion-house in *Toton*, then in the possession of *John Jacques*, with several closes (particularly named in the bill filed in 1662), all which last mentioned hereditaments *Arthur Warren* affirmed to be of the value of 100*l.*, but that the same were in lease to *Jacques* at 60*l. per annum*, and therefore he proposed to give a bond to secure the 60*l. per annum* in lieu of the tithes, during the continuance of the lease to *Jacques*, so as the defendants would discharge his lands from payment of tithes, and perform the rest of the agreement; and further alleging, that the defendants the preacher, schoolmaster, church-wardens, and overseers of *Chesterfield*, and the two colleges in *Cambridge*, were unwilling to consent to the agreement, though they all knew the same to be for their benefit; and the bill prayed to have an execution of the agreement, and that the manor of *Toton* and the plaintiff's lands there, might be discharged of tithes, and that 60*l. per annum* might be settled and secured in lieu thereof,

thereof, and that the lands so set out might be enjoyed accordingly, and the same agreement performed.

By a decree made at the Rolls, on the 31st of October, 1670, beginning with the words, "Upon hearing and debating of the matter in question this present day, in the presence of counsel learned for all the said parties," and stating the bill, and that all the defendants, by their several answers, confessed the will of *Godfrey Foljambe*, and that the rectory was settled and vested in the defendants *Peirpoint* and others the trustees in the bill named; and that the said trustees and *Henry Foljambe* deceased, their tenant, (who had died since filing the bill, and whose executors *John* and *Henry Foljambe*, were made parties by bill of revivor) confessed the agreement, and that they, and the preacher and schoolmaster, and the churchwardens and overseers of the poor of the parish of *Chesterfield*, submitted to the performance thereof, and the trustees submitted also to convey, pursuant to the agreement, so as they might be protected by the Court; and that the defendants, the Masters and Fellows of the Colleges, by their answers, said, that the trustees being gentlemen of value and credit of the parish of *Chesterfield*, they were induced to believe that the agreement was for the benefit of the charitable use, and therefore they should not oppose, but submit to the judgment of the Court, how far the same should be performed, with this, that the lands to be enjoyed in lieu of the glebe lands in *Toton*, and the 60*l.* per annum to be settled for the security thereof, might be declared liable to the payment of the 20*l.* and 13*l.* 6*s.* 8*d.* yearly to them and their successors, at their respective colleges, as formerly the glebe lands and tithes in *Toton* stood liable thereunto, according to the will of *Godfrey Foljambe* the original founder of the charity: "Upon debate whereof, and hearing of what could be alledged on either side," the Court declared, that the said agreement should be performed,

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1818.  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 WARREN.



1818.  
 ~~~~~  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 WARREN.

and that the plaintiffs, according to their several estates and interests, should hold and enjoy the said manor, and all the lands and hereditaments in *Toton* whereof or wherein they, or any of them had any interest, and not set out to the defendants, and also the lands allotted to the plaintiffs, or any of them, by the agreement, discharged of all tithes for ever, and of the before-mentioned yearly payments to the minister and school-master of *Chesterfield* for the time being, and of the aforesaid yearly sums to the colleges, or either of them, and of all fee-farm rents issuing out of or chargeable on the rectory; and that in lieu thereof the plaintiffs should convey and settle the lands offered for security of the 60*l. per annum* to the defendants the surviving trustees, and their heirs, or as they should appoint; which 60*l. per annum* the defendants, the *Foljambes*, were to receive during their term; and after the trustees, their heirs and assigns were to receive the same, and the plaintiff *Warren* was to pay the 60*l. per annum* to the defendants, the *Foljambes*, for their term, at the times mentioned in the decree; and after the expiration of that term, to the trustees and their heirs and assigns, at the same times: And it was ordered, that the plaintiff *Warren* and his son should give a bond to the defendants, the trustees, for the payment thereof during the lease to *Jacques*, and that the *Foljambes* and the surviving trustees should convey the ancient glebe lands which were allotted by the agreement to the plaintiff *Warren* and were not set out by the defendants, unto the plaintiffs and their heirs, or in such manner as the plaintiff *Warren* should desire, discharged of all fee-farm rents, and other rents or charges issuing or payable out of the same: And it was further ordered, that the defendants, the *Foljambes*, for their term, and afterwards the trustees and their heirs, should hold and enjoy the lands to them allotted and set out by the agreement in lieu of the ancient glebe lands and common of pasture, discharged of the payment of tithes for ever, as the glebe lands of the same rectory in *Toton*, and of all fee-farm rents and other rents  
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and charges theretofore payable out of the same; and that the same should be for ever thereafter accepted and reputed as the glebe lands of the same rectory, and charged with all payments therefore due out of the rectory and ancient glebe lands, as the same should thereafter become payable; and that all taxes or assessments which were or should be assessed or imposed upon or for the tithes, or the 60*l.* *per annum*, to be settled in lieu of the tithes, by any act of Parliament or public authority, should be equally borne by the plaintiff *Warren*, his heirs and assigns, and by the defendants, the *Foljambes*, and the other defendants, the trustees, according to their respective interests, according to the agreement and the intent and true meaning thereof, and as the same had been usually paid since the agreement; and that the plaintiffs should make conveyances of the lands set out in lieu of the ancient glebe lands and common of pasture accordingly, to the surviving trustees and their heirs, or as they should direct; and the trustees were to be protected by this Court for what they should do in pursuance of the decree; and if the parties differed in the conveyances, then Sir John Coele, Knight, one of the Masters of this Court, was to reconcile and settle the same; and the plaintiff *Warren*, if he had not already made, was to make the fences according to his offer in the bill, and the fences were afterwards to be maintained according to the agreement, and he and the other plaintiffs, and also the trustees, and the defendants the *Foljambes*, were to do and perform all other things not already performed according to the agreement. And it was further ordered and decreed, that as well the whole rectory of *Adenborough*, (the tithes and glebe in *Toton*, and the lands of the plaintiffs, and which they were to have by the agreement and in pursuance of the decree excepted) as the 60*l.* *per annum* so to be secured in lieu of the tithes of *Toton*, and the lands so set out or to be set out for security of the 60*l.* *per annum*, and in lieu of the glebe of the rectory in *Toton*, should for ever stand charged and liable in the hands

1818.  
  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 WARREN.

1818.

~  
The  
ATTORNEY-  
GENERAL  
v.  
WARREN.

of the trustees, their heirs and assigns, to the payment of the several sums to the several persons therein mentioned respectively, and the residue of the profits of the rectory, and of the 60*l.* per annum, and the lands set out for the glebe in *Toton*, should be for ever employed and disposed of for the relief of the poor, impotent, and needy people of *Chesterfield*, *Brampton*, and *Wingerworth*, and elsewhere in the parish of *Chesterfield*, according to the intent and true meaning of the will of *Godfrey Foljambe*, the original founder of the charity; and the sums of money therein mentioned, were to be paid yearly at the Colleges aforesaid, out of the 60*l.* per annum, and the residue of the profits of the rectory, to the Bursars of the respective Colleges, at the times expressed in the decree (a).

By indenture dated the 12th of September, 1673, in pursuance of and obedience to the decree, *Arthur Warren* assigned to the then trustees of the charity, for the residue of the term of one thousand years, all the arable, meadow, and pasture grounds which, by the agreement and decree, were set out and decreed to belong to and be enjoyed with the rectory, in lieu of the former glebe lands situate in *Toton*, set out for *Arthur Warren*, and also seven acres of land in *Toton Moor*, set out also according to the agreement and decree, to be enjoyed in satisfaction of the commons belonging to the rectory in *Toton*; also the mansion-house and lands then or then late in the possession of *Jacques*; and by the same indenture, *Hopton Shuter*, by the direction of *Arthur Warren*, in further obedience and execution of the decree, at the nomination of the trustees of the charity, conveyed the same hereditaments unto and to the use of *Hugh Bateman*, *Ambrose Phillips*, and *John Moorewood*, in fee, upon trust for the trustees of the charity. The deed contained covenants by *Arthur Warren* and *Shuter*, for quiet enjoyment, and for the validity of the lease for one

(a) *Reg. Lib. B.* 1670, fol. 232. *Warren v. Peirpoint*.

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thousand years; that the property in lease to *Jacques* then was, and from the end of the term then to come in *Jacques's* lease, should continue to be of the clear yearly value of 100*l.*; also a proviso that the trustees of the charity and their trustees, *Bateman*, *Phillips*, and *Moorewood*, should permit *Warren*, his heirs and assigns, to receive the rents of the premises in lease to *Jacques*, until *Warren* should make default in payment of the yearly sum of 60*l.* to the trustees of the charity, during the remainder of the term of one thousand years, and to *Bateman*, *Phillips*, and *Moorewood*, their heirs and assigns, after the end or other determination of the remainder of the term, and one moiety of all taxes to be imposed on the tithes of *Toton*, or on the 60*l. per annum*, according to the agreement aforesaid, which 60*l. per annum* was to go in satisfaction of the tithes of all the lands which were *Arthur Warren's*, in *Toton*, at the time of the agreement made in 1661, according to the decree. There was also a covenant by *Arthur Warren* with the trustees of the charity, for payment of the 60*l. per annum*, and one moiety of all taxes, as before-mentioned.

1818.  
The  
ATTORNEY-  
GENERAL  
v.  
WARREN.

By the same deed, the trustees of the charity, for the considerations before-mentioned, and in obedience to the decree, demised to *Arthur Warren*, his executors and assigns, all their glebe lands belonging to the rectory, and situate in *Toton*, and which *Warren* had taken in and inclosed in severalty with his other lands in *Toton*; and all those their tithes of corn and grain and other tithes whatsoever to the said rectory belonging, arising upon the said glebe lands, or upon any other lands which, at the time of the agreement, were the lands of *Arthur Warren* in *Toton*; (all tithes, &c. belonging to the rectory, arising upon the lands then late *Arthur Warren's*, which, by the decree, were set out in lieu of the glebe lands of the rectory, and, by virtue of the decree, were conveyed, or to be then conveyed away by *Warren*, in lieu

1818.

The  
ATTORNEY-  
GENERAL  
v.  
WARREN.


of the trustees, their heirs and assigns, to the payment of the several sums to the several persons therein mentioned respectively, and the residue of the profits of the rectory, and of the 60*l.* *per annum*, and the lands set out for the glebe in *Toton*, should be for ever employed and disposed of for the relief of the poor, impotent, and needy people of *Chesterfield*, *Brampton*, and *Wingerworth*, and elsewhere in the parish of *Chesterfield*, according to the intent and true meaning of the will of *Godfrey Foljambe*, the original founder of the charity; and the sums of money therein mentioned, were to be paid yearly at the Colleges aforesaid, out of the 60*l.* *per annum*, and the residue of the profits of the rectory, to the Bursars of the respective Colleges, at the times expressed in the decree (a).

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(a) *Reg. Lib. B.* 1670, fol. 232. *Warren v. Peirpoint*.

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thousand years; that the property in lease to *Jacques* then was, and from the end of the term then to come in *Jacques's* lease, should continue to be of the clear yearly value of 100*l.*; also a proviso that the trustees of the charity and their trustees, *Bateman*, *Phillips*, and *Moorewood*, should permit *Warren*, his heirs and assigns, to receive the rents of the premises in lease to *Jacques*, until *Warren* should make default in payment of the yearly sum of 60*l.* to the trustees of the charity, during the remainder of the term of one thousand years, and to *Bateman*, *Phillips*, and *Moorewood*, their heirs and assigns, after the end or other determination of the remainder of the term, and one moiety of all taxes to be imposed on the tithes of *Toton*, or on the 60*l. per annum*, according to the agreement aforesaid, which 60*l. per annum* was to go in satisfaction of the tithes of all the lands which were *Arthur Warren's*, in *Toton*, at the time of the agreement made in 1661, according to the decree. There was also a covenant by *Arthur Warren* with the trustees of the charity, for payment of the 60*l. per annum*, and one moiety of all taxes, as before-mentioned.

1818.  
  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 WARREN.

By the same deed, the trustees of the charity, for the considerations before-mentioned, and in obedience to the decree, demised to *Arthur Warren*, his executors and assigns, all their glebe lands belonging to the rectory, and situate in *Toton*, and which *Warren* had taken in and inclosed in severalty with his other lands in *Toton*; and all those their tithes of corn and grain and other tithes whatsoever to the said rectory belonging, arising upon the said glebe lands, or upon any other lands which, at the time of the agreement, were the lands of *Arthur Warren* in *Toton*; (all tithes, &c. belonging to the rectory, arising upon the lands then late *Arthur Warren's*, which, by the decree, were set out in lieu of the glebe lands of the rectory, and, by virtue of the decree, were conveyed, or to be then conveyed away by *Warren*, in lieu

1818.  
 ~~~~~  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 WARREN.

of the said glebe lands, excepted) To hold to *Arthur Warren*, his executors, administrators, and assigns, for nine hundred and eighty years, being the remainder of the said term of one thousand years then to come and unexpired; and the trustees of the charity covenanted with *Warren* for quiet enjoyment of the glebe lands and other the premises thereby leased to him for the term of nine hundred and eighty years; and to the end that the lands thereby conveyed to the trustees of the charity for the remainder of the term of one thousand years, and to *Bateman, Phillips, and Moorewood*, and their heirs, and the lands and tithes conveyed to *Warren* for the nine hundred and eighty years, and which were intended to be conveyed to *Hopton Shuter* and his heirs, might be enjoyed by all persons respectively, according to the true meaning of the decree, it was declared that it was the intent and true meaning of the decree and indenture, that *Warren*, his executors and assigns, and *Shuter*, and his heirs, according to the respective interests conveyed to them, should for ever thereafter enjoy the lands and tithes so conveyed, or thereafter to be conveyed to them respectively, discharged of all fee-farm rents, and all and every the said annual or other payments payable out of the rectory or tithes, (the one moiety of the public taxes for the 60*l.* per annum for the tithes of *Toton*, which *Warren*, his executors or assigns were to pay, only excepted); and that in like manner the trustees of the charity, their executors and assigns, and *Bateman, Phillips, and Moorewood*, and their heirs, according to their respective interests, should for ever thereafter enjoy the lands conveyed to them respectively, discharged from all fee-farm rents or other charges payable thereout; but that all parties were to pay all public taxes for the lands or tithes to them conveyed (the moiety of the taxes for the 60*l.* per annum for the tithes of *Toton*, which were to be paid by *Arthur Warren*, and all claiming in trust for him, according to the agreement and decree, only excepted).

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By another indenture, dated the 13th of *September*, 1673; the trustees of the charity, in pursuance and part-performance of the agreement and decree, by the nomination of *Arthur Warren*, granted, enfeoffed, and confirmed to *Hopton Shuter* in fee, in trust for *Warren* in fee, all the lands and tithes by the preceding indenture demised to *Warren* by the trustees of the charity.

1818.  
 ~~~~~  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 WARREN.

The information, filed the 21st of *November*, 1815, after stating that the rectory had, by mesne assurances, been conveyed to the relators upon the trusts of the will of *Godfrey Foljambe*; that they were the impropriate rectors of the parish of *Adenborough*, and as such, entitled to the tithes of corn and hay arising within the parish, proceeded to state that the defendant was the proprietor and occupier of lands at *Toton*, within the parish of *Adenborough*, from which he had taken considerable quantities of titheable matters, without paying tithes to the relators, and alleged that the defendant pretended that a lease or agreement dated the 12th of *September*, 1673, was granted or agreed to be granted by the then trustees of the charity, to *Arthur Warren*, an ancestor of the defendant, whereby the then trustees demised, or agreed to demise to *Arthur Warren* for nine hundred and eighty years, all the tithes of corn, and other tithes belonging to the rectory, and growing upon any of the lands, and that the lease had ever since been acted upon and adopted by the owners and occupiers of the lands at *Toton*, for the time being, and by the trustees of the charity; the information charging that the compensation made by the alleged lease, in lieu of the tithes, was in the greatest degree inadequate and fraudulent; that the lease was illegal and void, and that the then trustees of the charity were not enabled to enter into, or to grant any such lease, the consequences whereof tend in the highest degree to injure the interest of the charity; that the lease could only be binding on the parties thereto, and that the relators were, notwithstanding, entitled to take  
 and



1818.

~  
The  
ATTORNEY-  
GENERAL  
v.  
WARREN.

and receive the tithes of corn, grain, and hay yearly renewing on the lands in the defendant's occupation. And the information prayed that the lease or agreement might be declared illegal and void, and be ordered to be delivered up and cancelled, and an account and payment of the tithes.

The defendant, by his answer, stated the decree, and the deeds executed pursuant to it: that *Arthur Warren*, under the indentures became possessed of the glebe lands and commons, and of all the tithes arising upon the glebe lands, or upon the manor and lands of or in *Toton*, and which belonged to him at the time of the agreement, for the remainder of the term of nine hundred and eighty years, and entitled to him and his heirs to the reversion of the same; and that he, and those claiming under him, had ever since the decree, and by virtue thereof, and of the before mentioned demises and conveyances to and in trust for him, received or retained all such tithes arising upon the said lands in *Toton*, which had, ever since, been enjoyed with the manor; that the 60*l. per annum* had always, since the time aforesaid, been paid to the trustees for the time being of the rectory or parish of *Adenborough*, (which was admitted by the relators), and had been received by them, in lieu and satisfaction of all tithes arising upon the said manor and lands, of or in *Toton*; and that no claim had ever to the defendant's knowledge, been made in respect of such tithes, or any objection raised to such payment, until the time afterwards mentioned; that the lands in the indenture of the 12th of *September*, 1673, mentioned to be laid together, or appropriated to the rectory, and to be conveyed to the trustees, had, as the defendant believed, ever since the times aforesaid, by virtue of the decree and the indenture of the 12th of *September*, 1673, been held by the trustees of the rectory, upon the trusts of the will of *Godfrey Foljambe*, and by them let to a tenant; that the estates of *Arthur Warren* in *Toton*, and which belonged to him at the time of  
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the agreement and decree (except such parts as were conveyed to the trustees of the charity), had become vested in the defendant, and that the lands and tithes demised or conveyed to, or in trust for *Arthur Warren*, were, in like manner, vested in the defendant, as parcel of the manor; that since he became the proprietor of the estates and tithes, he had regularly paid the 60*l.* *per annum* to the trustees of the rectory, to the 11th of *October*, 1814, down to which time they had never objected to it, but that since that time, the agent of the relators had refused to receive it. And the defendant insisted, that he ought not to be disturbed in the enjoyment of the tithes, or deprived of the benefit of the agreement and the decree by which it was established and confirmed; that the relators were bound and concluded thereby, in every particular of the agreement, otherwise that it must be considered void as to every part thereof, and that the lands so laid together and set apart and conveyed to the trustees of the charity, ought, in such case, to be reconveyed to the defendant.

1818.  
  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 WARREN.

Mr. *Wetherell*, Mr. *Dowdeswell*, and Mr. *Horne*, for the relators. The law of the Court prohibiting long leases of charity estates, is well settled by *The Attorney General v. Owen* (a) *The Attorney General v. Griffith* (b) and *The Attorney General v. Backhouse* (c); which cases, and *Blackston v. Hemsworth Hospital* (d), are authorities to shew that the Court will interfere after the lapse of many years, and notwithstanding repeated alienations and transmissions of the property. In the latter case, the Court relieved the charity against an improper alienation of its property, notwithstanding there had been intermediate descents, purchases for valuable consideration, and fines with proclamations; it is therefore a strong authority establishing the proposition, that no conveyance which creates a breach of

(a) 10 *Ves.* 555.

(b) 13 *Ves.* 563.

(c) 17 *Ves.* 283.

(d) *Duke*, 49.

1818.  
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 The  
 ATTORNEY-  
 GENERAL  
 v.  
 WARREN.

trust of a charity estate, can be exempted from the jurisdiction of the Court. There is no statute of limitations affecting the rights of a charity. The only case excepted out of the statute of charitable uses (a), is that of a purchaser for a valuable consideration without notice, a character which neither the defendant nor his ancestor could sustain, for the very instrument demising the tithes to *Arthur Warren*, discloses the fact that they belonged to the charity; nor indeed is the point of his being a purchaser for a valuable consideration without notice, raised by the pleadings. This is also the case of a rector suing for payment of his tithes in kind, and it is incumbent on the defendant to shew some ground for resisting the demand.

Supposing this to have been a transaction originally contrary to the rules of the Court, respecting alienations of charity estates, it cannot derive validity from the decree which is insisted on by the defendant. On this point, the case is within the principle of *The Attorney General v. Cholmley* (b). During the reigns of Queen *Anne* and *George the First*, it was an usual practice to make private and amicable decrees between rectors and their parishioners on the subject of compositions or agreements for tithes, but such decrees have long been discontinued, and it is now well established that they are not valid. In the present case, it will be contended, that it was the judgment of this Court, that the tithes now in question should be demised for a term of nine hundred and eighty years, at a yearly rent of 60*l.* amounting in effect to a perpetual alienation. But a Court of Equity cannot, in direct opposition to the law of the land, decree such an alienation. If the agreement was not good in itself, it cannot be good because it is embodied in a private decree of this kind. A decree is a judicial decision on a *bonâ fide* litigation. But this proceeding has no such character. The

(a) 43 Eliz. c. 4.

(b) *Ambl.* 510. 3 *Burn's Eccl.*

*Law*, 416. 2 *Eden*, 304. 7 *Towl.*  
*P. C.* 34.

circumstance

circumstance of the Attorney General not having been a party to the suit, is a decisive objection to the validity of the proceedings, and clearly shews what was the real object of the parties. It would have been the duty of the Attorney General to oppose the decree, and to protect the rights of the poor persons who are principal objects of the charity. It is true that the trustees and the preacher were before the Court, and that they were sufficient to protect their own interests; but they had merely certain specified pecuniary charges, they were only interested to the extent of seeing that those charges were adequately secured, and would not volunteer their protection to the other objects of the charity. The Court always requires the concurrence of the Attorney General, when the interests of a charity are to be affected; but he would not have concurred in such a proceeding as that which is now before the Court, and for that reason he was not made a party to the suit. It does not appear that any replication was filed to the answers, that any evidence was entered into, or that there was any enquiry into the value of the property. It is the mere form of a decree taken by consent between parties who only thought of protecting their own limited interests, and were totally indifferent to the other objects of the charity. The language of the decree clearly shews that this was the nature of the transaction. The defendants the trustees, and their lessee, "confess the agreement," and they and the preacher, schoolmaster, churchwardens, and overseers of *Chesterfield*, "submit to the performance thereof, and the trustees submit also to convey pursuant to the agreement, so as they may be protected by the Court," without making any struggle or even enquiry on the subject. Their only object was to obtain protection and indemnity from the Court for doing something which they could not otherwise do with safety. They knew that a personal indemnity was necessary for trustees who had entered into an agreement of this description. They knew that it was a breach of trust, and naturally endeavoured

1818.  
The  
ATTORNEY-  
GENERAL  
S.  
WARREN.

1818.  
  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 WATKIN.

deavoured to obtain some indemnity. The Court, however, will see that all was done which justice required. The decree directs no enquiry. The Court saw nothing but what the parties laid before it. It was not a hostile suit, but in effect, a suit by consent. The effect of the sentence or decree of a Court, when obtained either by collusion, or by private agreement of individuals for answering their own purposes, was much discussed in the *Duchess of Kingston's* case (a). The following passage (b), from the eloquent argument of the Solicitor-General (c), is applicable to the present question :

“ A sentence obtained by fraud and collusion, is no sentence. What is a sentence? It is not an instrument with a bit of wax and the seal of a Court put to it; it is not an instrument with the signature of a person calling himself a register; it is not such a quantity of ink bestowed upon such a quantity of stamped paper: a sentence is a judicial determination of a cause agitated between real parties, upon which a real interest has been settled: in order to make a sentence, there must be a real interest, a real argument, a real prosecution, a real defence, a real decision. Of all these requisites, not one takes place in the case of a fraudulent and collusive suit: there is no judge, but a person invested with the ensigns of a judicial office is misemployed in listening to a fictitious cause posed to him; there is no party litigating, there is no party defendant, no real interest brought into question, and, to use the words of a very sensible civilian on this point, “ *Fabula, non judicium, hoc est; in scenâ, non in foro, res agitur.*”

Mr. Hart, Mr. Bell, and Mr. Blenman, for the defendant. This case is very different from *The Attorney Gene-*

(a) 20 *Howell's State Trials*, 355.  
 (b) Page 478.

(c) Mr. Wedderburne, afterwards Lord Chancellor Loughborough.

*val v. Cholmley.* That was the case of an ecclesiastical rector; an agreement had been entered into by *Cholmley* and *Hall*, with the rector, whereby, in consideration of annual payments, they were to hold the lands free from tithes. There was also an agreement for an exchange of glebe. A bill was filed against the rector and the bishop, for carrying this agreement into execution, and there was a decree confirming the agreement, with some additions to the annual payments. The case came on upon an information by the Attorney General, on behalf of his Majesty, who was patron of the rectory, and at the relation of a succeeding rector, and also on a bill by the rector, to set aside the decree. The proceeding by information was probably adopted out of abundant caution, but it does not appear to have been necessary, as the other parties were competent to maintain the suit. It was objected that the transaction was contrary to the disabling statutes, which apply to ecclesiastical property, though not to the property in question in the present suit. It was also contended that the decree was erroneous, as it could not bind the inheritance of the church; and that before the disabling statutes, church property could not be alienated but by consent of the patron, ordinary, and parson, the former of whom was no party to the suit in which the decree complained of was pronounced. And on those grounds, Lord Northington reversed the decree, as affecting the interests of persons not parties to the suit, and as being contrary to the disabling statutes, and therefore erroneous. A second question in that case was, whether, as the agreement related not only to the tithes, but to an exchange of lands, if it was rescinded, it must not be rescinded *in toto*. But Lord Northington was of opinion that the agreement relative to the lands was to be considered distinct from that relating to the tithes; and he therefore decreed payment of the tithes, but did not place the

1818.

The  
Attorney-  
General  
v.  
Walker.

1818.  
 ~~~~~  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 WARREN.

the parties in their former situation by restoring the possession of the lands as before the exchange.

In the present case, the parties to the suit of 1670 were the trustees and the *cestui que* trusts. At law the trustees were competent to make a conveyance, for the property was vested in them as a lay fee, but unless it was made under the sanction of a decree, this Court would *prima facie* controul and set it right. The trustees of a charity may convey with the consent of a Court of Equity. In a case which occurred about seven years ago, and in which Mr. *Hollist* was counsel, part of the property of a charity consisted of an old house near *Lewes*, which had produced a considerable income by being let to various tenants, but having become much out of repair, it had latterly afforded no revenue whatever, although it was stated that it could be sold for a considerable sum. An information was filed, and at the hearing, a reference was made to the Master to enquire whether it would be for the advantage of the charity, that the house should be sold. This decree was made by Sir *William Grant*, on the authority of a decree by Sir *Thomas Clarke* or Sir *Thomas Sewell*, which was produced by Mr. *Hollist*. But, independent of authority, the principle is clear, that the Court would not permit the property of a charity to be destroyed, rather than that it should be sold, when it can be sold to advantage. Many other cases may be put. Suppose part of the land belonging to a charity should be in front of the house of a person who would give for it three times its real value in lands in the immediate neighbourhood, the Court would undoubtedly sanction an exchange under such circumstances. In *The Attorney General v. Cross (a)*, the Court considered, that although a lease for ninety-nine years of a charity estate, would be improper at the present day, yet it appearing

(a) 3 Meriv. 524.

to have been the ancient mode of letting, and warranted by the custom of the country, the information was dismissed. It may be admitted, that such cases must be rare, and must depend on special circumstances, but they establish the principle, that the Court will sanction a trustee, in parting with the charity property when it appears clearly advantageous. In such cases, according to the practice which now prevails, (but which was not so general formerly), the Court would expect that the Attorney General should be a party. It was only formerly considered to be necessary when some rights were to be decided. In the case of an occupier refusing to pay tithes which belonged to a charity, it would only have been thought necessary that the trustees or lessees should file a bill.

Supposing then, the principle to be established, that there may be cases where an alienation by the trustees of a charity will be sanctioned, it is necessary to advert to the particular circumstances of the present case. If there had been nothing but the deeds, the trustees might have filed a bill for the purpose of setting them aside as an improvident administration of the charity estates. If this had been a mere husbandry lease for nine hundred and eighty years, there can be no doubt that it would have been highly improper. But it is an arrangement of a very different kind. There is an exchange of lands: some lands besides an annuity are given to the church. The Court will not, at once, say that this was an improper arrangement. There is no evidence of the present value; the whole case rests on its being an improper administration of the charity estate. The rectory was subject to a lease at the time when this arrangement was entered into. The lessee was made a party, and gave up considerable rights: he agreed to accept 60*l.* per annum, and the lands given in exchange, and to join in all necessary acts. But even if the transaction rested merely on the deeds, the Court would not set them aside without enquiry.

1818.  
  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 WARREN.



1818.  
 ~~~~~  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 WARREN.

enquiry. There is, however, an existing decree of this Court, and it is admitted, that the lands have uniformly been enjoyed pursuant to the agreement, and that till a short time before the commencement of the present suit, the stipulated payments have been regularly made. If no deeds had been executed, there is an existing decree, giving to each party an equitable right against the other, directing conveyances to be executed, and each party to hold the lands according to the arrangement. In *The Attorney General v. Cholmley*, it was impossible that the alienation could be good, for it was in direct opposition to the restraining statutes. Those statutes were expressly intended to protect the church against such acts, and the principle of them applies to decrees in equity. In the present case, all parties were competent to undergo a decree. The decree in that case was entirely nugatory and against law. An act of Parliament had nullified the transaction. No person would seek to reverse a judgment contrary to the statute of *Elizabeth*, but it would be treated as a nullity, for a decree is within the equity of that statute.

Supposing the decree to be erroneous, it remains in force till it is reversed. *Ryall v. Bushby* (a), *Boddy v. Kent* (b). But no attempt of that sort is made here. The present suit is instituted by information, and not by information and bill. An information alone is sufficient when the suit is merely for the purpose of declaring and establishing a right. But in this case there should also have been a bill, for in the present state of the record there are not sufficient parties before the Court. The trustees are merely relators, and not parties, for a relator is no party, but a mere pledge for the costs. The Court can make no decree against a relator, except for payment of costs. For all other purposes he is a stranger. There is no abatement by the death of a relator (c). If a suit had been instituted by any of the inhabit-

(a) 1 Bro. C. C. 484.

(b) 1 Meriv. 361.

(c) *Mitford*, 79.

ants or any of the objects of the charity, as relators, treating the lease as an improper administration of the charity property, they must have made the trustees parties, and the circumstance of the trustees being the relators, can make no difference. It should have been prayed, that the decree might be declared fraudulent and void, or that it should be reversed for some alleged error, which should have been distinctly stated. It should have been alleged, either that on the face of the decree it was erroneous, or that the Court was imposed on, and that it would not otherwise have sanctioned the transaction. The case must then have been met on different grounds. It must have been shewn why the Court should set it aside. Suppose a College had given in exchange for a piece of land close to the College, or on which the Hall or Chapel was built, another piece of land, and that many years afterwards an information was filed, shewing that such an exchange had been made, and praying that it might be set aside; the Court would not set it aside after such a long period of acquiescence. In this case if the lease be set aside, still the decree would remain in force, and might be enforced by a supplemental bill. In *Blackston v. Hemsworth Hospital* (a), a decree of the Master of the Rolls was impeached and set aside by the commissioners of charitable uses; but the question here is, whether the decree of a preceding Judge can be reversed by a subsequent one, without its being complained of. All the persons interested in the charity estate should have been before the Court. They have a right to be heard as they were before. They would, in all probability, say that they are satisfied with the arrangement. It is an arrangement in which all the parties were concerned. It gives an advantageous option to the trustees of having the choice of glebe throughout the whole parish, with the single restriction that it should adjoin the hedge. Lands of the annual value of 100*l.* were conveyed to *Bate-*

1818.  
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 The  
 ATTORNEY-  
 GENERAL  
 v.  
 WARREN.

(a) *Duke*, 49.

man,

1813.  
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 The  
 ATTORNEY-  
 GENERAL  
 v.  
 WARREN.

*man, Phillips, and Moorewood*, as a security for the payment of the 60*l.* a-year, which is another circumstance distinguishing this case from *The Attorney General v. Cholmley*. The relators must relinquish all these benefits if they require the other parts of the transaction to be annulled. The Court will not, even if this record were properly framed, disturb the transaction, and with no evidence whether it was beneficial or not. If the Court interferes, it must be on the general ground that if the lease be too long, though it be pursuant to a decree, the Court will, at once, set it aside.

Mr. *Wetherell* in reply.—In an information for a charity, the Court does not require the same strict rules of pleading which are necessary in a suit between individuals. In *The Attorney General v. Whitely* (a), an omission in the original decree was corrected upon further directions, which could not have been done in a private suit without re-hearing the cause. The Lord Chancellor said, “Strictly the cause ought to be re-heard, and the Court ought to declare what is the charity. But in a charity case, I may do that now. Upon the principle that the information praying wrong relief, the Court will, as it ought, give such relief as will do justice to the defendants, I may, in a charity case, take so much liberty with the record, as now to examine and declare what is the charity, and proceed upon that.” And in *The Attorney General v. Brooke* (b), his Lordship said, “that the rule, in cases of charity, is almost that the general prayer is sufficient, and the Court will give the relief adapted to the case.” There are several earlier authorities to the same effect, particularly *The Attorney General v. Scott* (c), where Lord *Hardwicke* said, “that the information was not to be dismissed, whether what was prayed was properly prayed or not; for though the particular relief

(a) 11 *Ves.* 247.(b) 18 *Ves.* 324.(c) 1 *Ves.* 412.

prayed

prayed was wrong, the information by the Attorney General was not to be dismissed if the charity wanted any direction." In *The Attorney General v. Brereton (a)*, Lord Hardwicke stated the rule thus:—"Another preliminary objection (and which was mentioned at the bar) is, that the relator founds his case on a right of nomination in the rector or bishop, who is united with the rectory, and the defendants say if the relator has any right it is on the nomination of the vicar, and that he himself has been so nominated, and then, though a right appears in him, he must recover according to the right he has made, for he must recover both *secundum allegata et probata*. This I am of opinion would be so, if this had been a bill in his own name, for then I could never make a decree to establish a right appearing in him contrary to that set up. But this being an information in the name of the Attorney General, is an answer to that; for though such an information to establish a charity is mistaken in the circumstance of laying it, yet if it appears there is a charity, and the right appears in the whole cause, that information cannot be dismissed, but a decree must be made to establish that charity. That doctrine has been frequently laid down in this Court and allowed, because it is considered as a proceeding by an officer of the Crown; and as the King is *pater patrie*, the information, therefore, must not be dismissed; so that though the relator has mistaken his title, but however in the cause a title comes out for him and his successors, he must have that title established." On these authorities we contend that the rule which would have rendered an amendment necessary, if this had been a private suit, does not apply to an information, which is merely an official communication to the Judge by the proper officer. The result is, that if an information has been filed, on which the Attorney General is entitled to relief, the form of the record is immaterial. We admit that the defendant is not to be prejudiced; but in the present case the defendant states

1818.

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The  
ATTORNEY-  
GENERAL  
v.  
WARREN.

(a) 2 Ves. 425.

1818.  
 ~~~~~  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 WARREN.

his title by setting up the decree in his own answer. He is neither prejudiced nor surprised, for he has exactly the same means of defence as if the decree had been mentioned in the information. The amendment would have been merely an addition of a few lines to the information, suggesting a pretence of the decree, and praying that it might be rescinded. If the information presents a substantial case for relief, the Court will grant it notwithstanding the shape of the record. It does not appear that the information in *Blackston v. Hemsworth Hospital* (a), prayed a reversal of the decree. The decree of Lord Northington in *The Attorney General v. Cholmley* contains no declaration that the former decree should be set aside. If it was necessary for the information to pray for its reversal, a declaration of such reversal would have been contained in the decree. The form of Lord Northington's decree shews that the former was treated as a nullity, and not as a decree having any judicial force. The Attorney General was not bound to consider this as an existing decree. He was at liberty to consider it as *res inter alios acta*. In *Dawson v. Sellers* (b), Lord Thurlow held that an order which had been irregularly obtained, was a nullity, and refused to make an order for discharging it, because it would be giving existence to that which was a nullity.

The general question as to the granting of long leases of charity estates is so well settled, that it is unnecessary to refer to authorities. It is a rule of great antiquity, and was acted upon in *Wright v. Newport Pond School* (c), and other early cases. The instances referred to by the defendant's counsel, in which long leases or alienations have been permitted, are distinguishable from the present. In the case of the house near *Lewes*, the late Master of the Rolls would not have directed the sale, except

(a) *Duke*, 49. [*Bridgman's edit.*  
644.]

(b) 2 *Dick*, 738.

(c) *Duke*, 46. [*Bridgman's edit.*  
649.]


on account of the inability of the trustees to repair the house, and the very small value of the property. In that case the Court directed an enquiry whether a sale would be for the advantage of the charity, but there was no enquiry in this case. In *The Attorney General v. Cross (a)*, it had been usual in the neighbourhood to grant leases similar to that which was sought to be impeached; the charity estates had previously been leased in the same manner, and fines had been fairly taken; on those grounds the Court refused to disturb the leases.

It is said that there should have been a bill as well as an information, and that the trustees of the charity are not parties to the suit, being named only as relators, and that a relator is no party, but merely a pledge for the costs. But no principle or authority has been referred to in support of this proposition. When persons are on the record, they are before the Court for all purposes, and in every character.

*The MASTER of the ROLLS.*—The most material circumstance in this case is the decree of 1670, both as it affects the validity of the contract *ab initio*, and the propriety of the form in which it is now endeavoured to be impeached; and it distinguishes the present from every preceding case. Admitting that the trustees could absolutely convey the legal estate in property of this description, the question in this Court always is, how far alienations for so long a term can prevail, when they amount to a breach of trust, in other words, when they are not consistent with that provident disposition of the charity estate, which the trustees are bound to adopt. There is no positive law determining that no alienation by trustees of a charity shall be good; if that were the case, even if there should be a reference to a Master and a report by him that the alienation was proper, yet if the alienation were in itself illegal, no such proceeding could give it validity. There have been

1818.  
  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 WARREN.

(a) 3 Meriv. 524.

1818.  
  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 WARREN.

many cases in which, on the authority of the Court, that has been done, as in the case from *Sussex*, referred to by Mr. *Bell*. If the alienation were in itself illegal, the sanction of this Court could be of no use. What then is the effect of the act of the Court? It is merely to shew that the act proposed is not an improvident one. In the case of *The Attorney General v. Cross (a)*, which was much considered by the late Master of the Rolls, it appeared that a lease had been granted of the charity estate for ninety-nine years, determinable on three lives; on enquiry into the subject, he was of opinion that he was not bound to set it aside, when he ascertained that the value was sufficiently considered, and when it appeared that it was not a lease granted *de novo*, but that it had been for many years the habit in that part of the country to grant similar leases. Now it is obvious that the custom of the country could not support the lease, if it was against law. In *The Attorney General v. Smith (b)*, on a reference to the Master it appeared that the property in question had been recovered to the charity by the industry of the defendant's ancestor, and that a lease for ninety-nine years, determinable on lives, and renewable for ever, had been granted to him; Lord *Cowper* held the defendant to be entitled to the benefit of the agreement for renewal, contained in the lease granted to his ancestor. All these cases shew that it cannot be maintained as an inflexible proposition, that no permanent interest can be given by the trustees of a charity, without incurring a breach of trust.

The question then is, whether, under all the circumstances, it was proper. It appears that *Foljambe* had taken on himself to enter into an agreement with *Warren*, for a fixed term, at a rent of 60*l.* a-year for the remainder of *Foljambe's* term. It was accompanied by an agreement relative to the glebe. It seems to have been for the interest of the rector that his glebe should be thrown together, giving him the

(a) 3 *Meriv.* 524.

(b) 2 *Vern.* 746.

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choice, and giving him also seven acres in addition, in lieu of right of common. It does not appear what was the precise nature, either of his right of common, or of his interest in the tithes, nor what was the right of the tenant. We only know that there was to be a rent of 60*l.* a-year, and this agreement relative to the glebe. Stopping here, and seeing only an agreement for nine hundred and ninety-eight years, it would be difficult to deny that the transaction would be a breach of trust. *It has the effect of preventing the rectors from availing themselves of the change of the times, and of deriving advantage from an increase in the value of the produce of lands. It may be said, on the other hand, that its effect might be to protect the rectors against diminution; if, however, that were to be a sufficient answer, it would apply to all cases of leases for long terms granted by trustees of charity estates. It is not fitting that trustees should be induced to speculate. By the changes of times, property is much altered, and what might at a former period have been perfectly fair, may appear very unfair now. It does not seem, however, to have been considered formerly as a disadvantageous mode of dealing with the property of charities. There are many cases in Duke, where the prospective possibility of diminution might have been a decisive objection. These principles were not so understood then, and it is probable, that at the time when the lease now under consideration was granted, it might be supposed that such a lease did not amount to a breach of trust. It is a very different question, whether the Court should now suffer the transaction to stand. But the subject is not to be considered nakedly. In reviewing a contract, the Court cannot look at one part of it, and disregard the rest. It would be necessary to examine the whole of the transaction, and consider whether, taken altogether, it was an improvident contract. Length of time, though not a bar, is certainly to be considered as an obstacle in the way of setting aside a contract made near one hundred and fifty years ago and acted upon ever since till the filing*

of

1818.

~  
The  
ATTORNEY-  
GENERAL  
v.  
WARREN.



1818.

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The  
ATTORNEY-  
GENERAL  
v.  
WARREN.

of this information. It creates a difficulty in ascertaining all the circumstances under which the agreement was made, and it requires a strong case for equity to interpose after such a lapse of time, at the instance of one of the parties who may have been enjoying all the benefit of the contract, for perhaps the whole or a great part of this time, and who never could have been compelled at the instance of the other party to relinquish it, when, from an alteration in the relative value of money, the agreement has become disadvantageous to him. It is additionally difficult in such a case to set aside one part of the contract, leaving the charity still to enjoy all the benefit of the other part; yet this information neither seeks, nor is properly framed, nor has the necessary parties for a complete rescinding of the whole agreement, and a restitution of both parties to their original rights, as they stood antecedent to the formation of it.

In the present case, however, we are relieved from that necessity, for it did not rest in contract. Even before the agreement was signed, the parties submitted it to a Court of Justice. A bill was filed by *Arthur Warren* and his trustees, against the then trustees of the charity, *Foljambe*, the tenant in possession of the rectory, the Master and Fellows of *Jesus and Magdalen Colleges*, the Preacher, Schoolmaster, and Churchwardens and Overseers of the Poor of *Chesterfield*. Was there any omission to inform them what was the nature of the intended contract, and of the term of the proposed lease? On the contrary, these subjects were prominently stated in the proceedings. No reference to a Master was necessary, for the bill distinctly states that the lease was to be for one thousand years. The answer of the trustees admits that such an agreement had been made by their tenant; they, however, were not bound. They submit to convey "so as they may be protected:" the two Colleges also submit, and the Court, "upon debate," decrees the agreement to be performed. What then could the trustees do after this decree? Could they refuse to execute the deed

when

when they had been ordered to convey? Can it be said that we are to assume the Court would lend itself to be ancillary to a transaction which was a fraud and a breach of trust? If there was a fraud and breach of trust, they were the acts of the Court rather than of the trustees; for with a perfect knowledge of all the facts, the Court made the decree. Are we not bound, on the question of propriety, and out of deference to the Court, to say, not that this was an improper agreement, *but, on the contrary, to presume omnia rite acta*. It is said the Court did not make any reference to the Master. It does not appear whether that was then the usual mode of proceeding. It might be, because the Court was satisfied that the agreement was proper. The question now, is not a mere abstract question, whether the trustees can alienate for a long term, but whether, when a Court has declared that this was a proper agreement, a subsequent Court is now to say the contrary? Suppose it were assumed that the Court was mistaken on the former occasion, is it a fraud in the trustees? When the Court orders it to be done, is it to be treated as a nullity? Where is the fraud? Fraud is where there is *aliud actum, aliud simulatum*; but here, every thing is professed, and nothing concealed. Here is a long term granted, which undoubtedly is open to much observation. But this is not the naked case of trustees doing such an act, but doing it with the direction of the Court. The relators must shew that the transaction is such, that neither the sanction of the Court, or lapse of time can give it effect.

But it is unnecessary further to consider this point. The present information merely prays an account and payment of tithes, and that an agreement may be set aside, without saying one word of the decree which is the foundation of the agreement. If the decree is sought to be impeached for fraud, the fraud should be put in issue. Was it ever heard, that after a solemn decree on a subject within the jurisdiction of the Court, and binding the inheritance, another Court

1818.  
  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 WARREN.

1818.  
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 The  
 ATTORNEY-  
 GENERAL  
 v.  
 WARREN.

Court is to determine directly the reverse? Is one Court to say it is a good, and the other that it is an improper agreement, and that without adverting to, or taking any notice of the former decree? This is entirely independent of any question respecting the propriety of the first decree, or whether it ought to be reversed or set aside for fraud. It is said that the Attorney General is not bound by forms. That is true, when the proper facts are in issue. But there is not a syllable on this record shewing the existence of any fraud. All the cases which have been cited shew that *no* injury is to be done to the defendant; but in this case the relators have not apprised the defendant that they meant to attack the decree on the ground of fraud; how then could he repel it? It is sufficient to say that there is nothing of fraud charged on the face of this information. It is said that what is now required was done in *The Attorney General v. Cholmley*, and several other cases of ecclesiastical rectors. But an ecclesiastical rector is prevented by the disabling statutes from granting leases to bind his successors. That is not the case with regard to trustees of a charity, for they have the legal fee, and may convey except under circumstances amounting to a breach of trust; but alienations by a rector are not binding on his successor, though good as against the party who makes them. In *The Attorney General v. Cholmley* the bill did put in issue the validity of the former decree, and the defendant was fully apprised that it was sought to be impeached. That decree failed of effect, because no power can give validity to a transaction which is contrary to an act of Parliament. It is admitted that in a charity case, if the Court, after referring the subject to a Master, ordered the execution of the lease, it would be good; but it clearly would not in the case of a lease of ecclesiastical property made contrary to the disabling statutes. The case of *Blackston v. Hemsworth Hospital (a)*, cannot

(a) *Duke*, 49.

assist the present information. The history of the proceedings in that case is given in *Watson v. The Master of Hemsworth Hospital* (a). It appears that the hospital was restrained by its constitution from granting leases for more than twenty-one years, and all the decisions, including the last in 1807, proceeded upon that principle.

1818.  
The  
ATTORNEY-  
GENERAL  
vs.  
WARREN.

With regard to the objection that the Attorney General was not a party to the suit in 1670, it is to be remembered that the Attorney General has no legal interest in the estate. He is to take care that those in whom the estates are vested, shall properly perform the trusts, but when any conveyances are to be made, he is not a necessary party. But supposing it might have been more fitting that the Attorney General should have been a party, is the decree therefore a nullity, and to be reversed by means of an information which does not even seek to impeach it? If it was meant to impeach it on that ground, or the others which have been mentioned, it would have been right to introduce all those circumstances into the information. The difficulty is in determining how the Court can in the face of such a decree, which is not sought to be impeached, declare it to be of no validity. On these grounds my present impression is, after much reflection on this case, that this information cannot be sustained (b).

On a subsequent day, his Honour said that he remained of the opinion he had before expressed, and dismissed the information.

[Reg. Lib. A. 1817, Fol. 2138.]

(a) 14 Ves. 324.

(b) On the subject of long leases of charity estates, see *The Attorney General v. Green*, 6 Ves. 432. *The Attorney General v. Owen*, 10 Ves. 353. *The Attorney General v. Grif-*

*ith*, 13 Ves. 565. *The Attorney General v. Backhouse*, 17 Ves. 283. *The Attorney General v. Brooke*, 18 Ves. 319. *The Attorney General v. Cross*, 3 Meriv. 524. *The Attorney General v. Moses*, 2 Madd. 294.

1818.

April 8. 14.

## MAYHEW v. CRICKETT.

Where a creditor, having already a warrant of attorney from his debtor, takes a promissory note from him and a surety, and afterwards enters up judgment under his warrant of attorney, and takes the goods of the principal debtor in execution, and subsequently withdraws the execution without the knowledge of the surety, he discharges the surety. But if the surety, after knowing that the execution is withdrawn, makes a new promise, his liability is restored, and he cannot object to the promise, as being without consideration.

The right of one surety to call on another to contribute, applies to cases where they become sureties by separate instruments, as well as to cases where they become sureties by the same instrument.

THE bill stated that previous to *August* 1814, one *Battely* employed the defendants as his bankers, and that they had advanced to him, or for his use, monies, for which they had taken warrants of attorney from him to confess judgment by way of security; and that in *August* 1814, *Battely* had over-drawn his account with them to the amount of 1000*l.* That *Battely* having occasion for the further sum of 300*l.* applied to the defendants to advance him that sum, which they agreed to do, provided he would procure two persons as sureties for the repayment thereof, and also of the balance then due from him; that *Battely* thereupon applied to the plaintiffs, *William Mayhew* and *Anna Gent*, to become such sureties, and the plaintiffs were induced to consent each to join *Battely* in a promissory note to the defendants for 650*l.*; and accordingly two promissory notes for 650*l.* each, dated the 20th of *August*, 1814, payable to the defendants on demand, with interest, were prepared, one of which was signed by *Battely* and the plaintiff *Mayhew*, and the other by *Battely* and the plaintiff *Gent*.

The bill further stated, that notwithstanding the agreement, and the notes being signed and given, the defendants did not advance to *Battely* the additional 300*l.* or any other sum, on the security of the notes. That in *November* 1814, *Battely* became embarrassed in his circumstances, whereupon, as the plaintiffs afterwards discovered, the defendants entered up judgment against him on their warrant of attorney, and issued execution under which they took possession of

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his dwelling-house, stock in trade, and effects, but that no application was then, or until long afterwards, made to the plaintiffs by the defendants, in consequence of their having given the promissory notes; that the plaintiffs, as the defendants had since discovered, after continuing several days in the possession of *Battely's* effects, agreed, on his application, and without consulting or apprising the plaintiffs, to withdraw, and did accordingly withdraw the execution, on *Battely's* paying the sheriff's poundage, and other expences.

The bill further stated, that in *August* 1815, *Battely* again became embarrassed, when, for the first time, the defendants applied to the plaintiffs to pay their promissory notes, and in *Michaelmas* Term last, commenced actions against them respectively thereon. And after insisting that the additional 300*l.* was never advanced to *Battely*, that the notes ought in equity to be considered void, and given without consideration, that by the withdrawing of the execution against *Battely's* effects without notice to the plaintiffs, they were discharged from all responsibility on the notes; the bill prayed, that the notes might be delivered up to the plaintiff *Mayhew*, or that the defendants might indemnify the plaintiffs against them; and an injunction against proceeding at law.

The answer stated, that a balance of 1000*l.* being due from *Battely* to the defendants, as his bankers, they held his warrant of attorney for that sum; and that being dissatisfied with the large balance due from him, *Bacon*, one of the defendants, informed *Battely*, that unless he procured a joint note from some persons of known respectability, the defendants would take possession of his effects under the judgment; to which *Battely* said, he could give unexceptionable security; whereupon *Bacon* told him, that if he (*Bacon*) should be satisfied as to the responsibility of such security, he might advance him 300*l.* more. That soon afterwards *Battely* brought the two notes mentioned in the bill to *Bacon*, who took them, saying he would make no further advance till he had satisfied himself as to the security. The answer further stated, that *Bacon*, on  
making

1818.

MAYHEW  
v.  
CRICKETT.

1818.

MAYHEW  
v.  
CRICKETT.

making enquiry as to the security, found it doubtful, and therefore refused to make any further advance, and admitted, that the 300*l.* had never in fact been advanced, and that no other sum was due from *Battely* to the defendants after the signing of the notes, save the sum of 1000*l.* and the subsequent interest, which were still due.

The answer also admitted that in *August* 1814, and previous to the delivery of the notes, *Battely* became embarrassed, and that the defendants therefore entered up judgment on their warrant of attorney, and sued out execution against his goods for 1019*l.* but that no warrant to levy was obtained until the 1st of *November* following, when the proper officer entered into the possession of the dwelling-house and effects of *Battely*, and continued such possession for five days; but that no levy was made, because the defendants were assured that the plaintiff *Mayhew* was able to answer the debt; and the defendants admitted, that on that assurance they consented, at *Battely's* request, to the execution being withdrawn, and which, on the 6th of *November*, 1816, was accordingly withdrawn, on the terms mentioned in the bill. The answer admitted that neither of the plaintiffs was informed or apprised of the execution, or of its being withdrawn, or was consulted in regard thereto, the defendants not thinking it necessary, as the plaintiffs did not know that the defendants held the warrant of attorney, and consequently, that such execution had been issued; and they admitted, that in *August* 1815, the defendants for the first time applied to the plaintiffs to pay and take up the notes, or the balance actually due to the defendants; and that the plaintiffs promised to take up the notes; and particularly the plaintiff *Mayhew*, promised to pay his note in the following *September*; at which time he came to the defendants, and stated that it was not convenient then to take up his note, but promised to do so at *Christmas*; and that on the 14th of *February*, 1816, the plaintiff *Mayhew* promised, in the presence of two persons named in the answer, to take up the notes on or before *Lady Day*

Day following, and that before that promise was made by *Mayhew*, he well knew that the defendants had taken possession of *Battely's* effects under the execution which had issued, and that the defendants had, at *Battely's* request and his friends', abandoned the same, and relied upon the notes as a security for the balance then due to them; but the defendants stated their ignorance whether the plaintiff *Gent*, when she made the promise to take up the note given by her, knew that the defendants had withdrawn their execution.

1818.  
MAYHEW  
v.  
CRICKETT.

On a motion being made on the coming in of the answer, to dissolve the common injunction which had been obtained, the Lord Chancellor ordered that the defendants should proceed to a trial of the action against the plaintiff *Gent*. The defendants had obtained a verdict against *Mayhew*, before the injunction issued.

The defendants having declined proceeding to the trial of the action against *Gent*, and abandoning all claim against her, now moved to dissolve the injunction as to the plaintiff *Mayhew*.

Sir *Arthur Piggott* and Mr. *Treslove*, in support of the motion. The plaintiff *Mayhew* resists the payment of the note, on two grounds, first, that time was given to the principal debtor; and, secondly, that there was no consideration for his subsequent promise to pay, both which points might have been urged by him in his defence to the action at law, in which a verdict has, notwithstanding, passed against him.

Mr. *Hart*, *contra*, contended, that this Court had a concurrent jurisdiction if the plaintiff had a defence at law, which was, however, very doubtful. On the trial of the action against *Mayhew*, the Judge said, that his defence was one which was proper for a Court of Equity. The plaintiff *Mayhew* is discharged by the omission of the defendants to perform the condition on which alone the notes were given; namely,



1818.

MAYHEW  
v.  
CRICKETT.

namely, the further advance of 300*l.* It is now admitted, that *Gent*, his co-surety, is released, which must operate also as a discharge to *Mayhew*, as it deprives him of his remedies against *Gent* for contribution. The subsequent promise by *Mayhew*, made without knowledge that he had been discharged, and being without any consideration, cannot restore his liability.

*The LORD CHANCELLOR.* In the case of *Deering v. The Earl of Winchelsea* (a), it was held, that the circumstance of the sureties being by separate instruments, made no difference in their rights to contribution. I once argued that it did, but in that case the Court of Exchequer decided the contrary. In this case *Battely*, the principal, was indebted to the defendants in 1000*l.* and it is admitted that there was a contract that if he could obtain a security to the amount of 1300*l.* the defendants would advance him 300*l.* more. We must not forget the obligation the plaintiffs entered into for the express sum of 1300*l.* I am not prepared to say whether the plaintiffs could successfully have availed themselves at law of the circumstances they now urge, to shew that they are discharged in equity. There are many cases, such as marriage brocage bonds, which were formerly considered as exclusively subjects of equitable cognizance, though a concurrent jurisdiction is now exercised by the courts of law. The defendants abandoned the execution which they had obtained against the effects of the principal debtor, and I have always considered it to be settled both at law and in equity, that if a creditor takes out execution, and afterwards releases it, he discharges the surety. If, however, there be afterwards a new promise on the part of the surety, I do not think it can be held to be without consideration. If it be clearly made out, that after knowing all these circumstances *Mayhew* made a new promise, I do not think he can resist it

(a) 2 Bos. & Pull. 270.

as without consideration. The case of *Deering v. The Earl of Winchelsea* has, I believe, never been shaken, but always confirmed.

1818.  
MAYHEW  
v.  
CRICKETT.

The LORD CHANCELLOR. This was a motion to dissolve the injunction so far as it respects the plaintiff *Mayhew*. The bill was filed by *Mayhew* and *Gent*, against the latter of whom I understand the defendants now admit that they have no demand.

April 14.

[His Lordship then stated the bill and answer.]

The promissory notes amounted to 1300*l.* and the debt being 1000*l.*, the notes exceeded the debt by 300*l.*, and it does appear as if they were meant to answer the proposed additional advance of 300*l.* It is now admitted that the notes were only to secure 1000*l.*; each note therefore must be considered in equity as merely a security for 500*l.* The mere circumstance of the plaintiffs' not knowing that the defendants held a warrant of attorney from *Battely*, is of no consequence, because the plaintiffs, being both sureties, would be entitled to the benefit of all the securities which the creditors had from the principal debtor (a). If the question had depended on this circumstance, I should have thought that had the plaintiff remained passive, if the defendants had thought fit to take the goods of the debtor in execution, they would not only in equity but at law, have waived all right against the plaintiff. But there is another circumstance which materially alters the case. It is said that *Mayhew*, knowing that the execution had been

(a) As in *Parsons v. Briddock*, 2 *Vern.* 608; principal and surety, the principal gives bail, judgment is recovered against the bail. The surety afterwards paying the debt, was held entitled to an assignment of the judgment against the bail. And in *Wright v. Morley*, 11 *Ves.* 12, a husband had assigned part of his wife's interest in the

dividends of stock for securing an annuity, for which the husband and a surety also gave their covenant. On a bill by the surety, who had paid a sum under his covenant, Sir *William Grant* decreed that he should be reimbursed out of the dividends of the stock, and that a sufficient portion should be set apart to answer the accruing payments.

withdrawn,

1818.  
 MAYHEW  
 v.  
 CRICKETT.

withdrawn, afterwards, in the presence of two persons mentioned in the answer, agreed to pay the debt. I do not think want of consideration can be alledged as an objection to an action founded upon such a promise. I think, that where time has been given to the principal, and the surety has thereby been discharged, a new promise by the surety cannot be objected to as without consideration (a).

This reduces the case to one of very singular circumstances, in which one surety is confessedly discharged, and there is a verdict against the other. It is necessary to consider the case of one surety discharged. The right of contribution between sureties exists not only in cases where they are sureties by one and the same instrument, but also where they are constituted sureties by different instruments. The case of *Deering v. The Earl of Winchelsea*, in which that was first decided, certainly shook the notions which formerly prevailed in *Westminster Hall* on the subject; and though I at one period was dissatisfied with that decision, I am now convinced that it was perfectly right (b). When one surety is discharged, the other may say, "You, the creditor, have affected my claims by discharging my co-surety, from whom I was entitled to demand a contribution, either by bringing an action myself, or by using your name in an action on your security." Another view of this subject is, whether it was competent to those defendants to make any use of the notes, if the fact should be,

(a) So in *Rogers v. Stephens*, 2 T. R. 713, on a question whether the drawer of a bill of exchange was not discharged for want of notice of its non-acceptance, the Court of King's Bench held it unnecessary to decide the point, because it appeared that the drawer had subsequently promised to pay the bill. See also to the same effect, *Hopes v. Alder*, 6 East, 16. *Lundie v. Robertson*, 7 East, 231. *Haddock v. Bury*, in a note to 7 East, 236.

A subsequent promise will also

revive a debt barred by the statute of limitations. *Hylking v. Hastings*, *Ld. Raym.* 389 Or by bankruptcy and certificate. *Freeman v. Fenton*, *Cowp.* 544. And a promise by a person after attaining twenty-one, to pay a debt contracted whilst a minor, will be enforced. *Southerton v. Whitlock*, 1 Str. 690. The authorities on this subject are collected in *Sels. Ni. Pri.* 58.

(b) See also the Lord Chancellor's observations on that case in *Craythorne v. Swinburne*, 14 Ves. 160.

as the bill alleges that the principal debtor was applying for credit for a further sum of 300*l.*, which the defendants agreed to give, but afterwards thought proper to withhold. There is some ground to believe that the notes would not have been given, if they had not been for 1350*l.* With respect however, to the plaintiff *Mayhew*, there are two considerations to be attended to: 1st, It is not clear whether the circumstances could have been effectually urged by him as a defence at law; but as he might have had considerable difficulties to contend with there, I think a Court of Equity might have relieved him: but 2dly, it appears that he subsequently promised to pay, and in all probability he made that promise with knowledge of the circumstances.

1818.  
  
 MAYHEW  
 v.  
 CRICKETT.

Upon the whole it appears to me, that deducting what the defendants have received from the bankrupt's (a) estate, the plaintiff *Mayhew* should pay into Court so much money as, with that sum, would amount to 500*l.*, without prejudice to all further questions; and that on those terms the injunction should be continued (b).

(a) It was stated that *Battely* the principal debtor, had become bankrupt.

(b) As to the discharge of a surety by releasing, giving time to, or accepting compositions from the principal, see *Ex parte Smith*, 1 Co. B. L. 168. 3 Bro. C. C. 1. S. C. *English v. Darley*, 2 Bos. & Pull. 61. *Clark v. Devlin*, 3 Bos. & Pull. 363. *Gould v. Rolson*, 8 East, 576. *Rees v. Berrington*, 2 Ves.

jun. 540. *Nisbet v. Smith*, 2 Bro. C. C. 579. *Law v. The East India Company*, 4 Ves. 824. *Wright v. Simpson*, 6 Ves. 714. *Ex parte Gifford*, *Ibid.* 807. *Boulton v. Stubbbs*, 18 Ves. 20.

On the subject of contribution between sureties, see *Cowell v. Edwards*, 2 Bos. & Pull. 268. *Deering v. The Earl of Winchelsea*, *Ib.* 270. and 1 Cox, 319. S. C. *Craythorne v. Swinburne*, 14 Ves. 160.

1818.

May 28.

## SMYTHE v. SMYTHE.

This Court will not grant an injunction to restrain a tenant for life without impeachment of waste, from cutting down trees, merely because they are in a thriving state. It must appear that they are unfit to be cut as timber.

**M**R. *Solicitor General* (with whom was Mr. *Rose*) moved, on behalf of the plaintiff, a remainder-man, for an injunction to restrain the defendant, a tenant for life without impeachment of waste, from cutting down trees. The affidavits in support of the motion specified the dimensions of the trees which had been marked by the defendant for cutting, and stated that they were growing and thriving trees, and such as the deponents would not cut; but it did not appear from the affidavits that they were unfit to be cut as timber. In support of the motion, the cases of *The Marquis of Downshire v. Lady Sandys* (a), and *Lord Tamworth v. Lord Ferrers* (b), were referred to.

*Mr. Bell, contrà*.—It is clearly settled, that a tenant for life, unimpeachable of waste, cannot be restrained from cutting down trees merely because they are thriving. The affidavits do not shew that they are unfit to be cut as timber.

*The LORD CHANCELLOR*.—It is clear that a tenant for life without impeachment of waste is not obliged to cut timber merely in such a way as a tenant in fee might think the most husband-like manner. He is only restrained from cutting such trees as are not fit to be cut as timber. It should be shewn that these trees are of that description. If the plaintiff can establish the fact that trees of the specified dimensions are not fit for the purposes of timber, he may make a case for an injunction, but that is a question which I cannot judicially determine. A party coming here for an

(a) 6 Ves. 107.

(b) *Ib.* 419.

injunction is bound to make out his case. At law, a tenant for life without impeachment of waste may cut down every thing. If this Court were to subject him to the same rules by which the discretion of a tenant in fee might regulate his own conduct, it would take from him nearly the whole of his legal right. The rule therefore is, that although trees may be in a thriving state, yet unless they be absolutely unfit for timber they may be cut by a tenant for life who is unimpeachable of waste. These trees would perhaps have not been cut by a tenant in fee-simple; but unless they be unfit for the purposes of timber, I cannot interfere. There is no rule which requires a tenant for life without impeachment of waste to suffer timber to grow until it attains its utmost value (a).

1818.  
SMYTHE  
v.  
SMYTHE.

Motion refused.

(a) For the principles on which this Court interferes to prevent waste by a tenant for life who is unimpeachable for waste at law, see the following cases, and the authorities referred to in the arguments and judgments. *Vane v. Lord Barnard*, 2 Vern. 738. *Packington's case*, 3 Atk. 215. *Aston v. Aston*, 1 Ves. 264. *Chamberlayne v. Dummer*, 1 Bro. C. C. 166. 3 Bro.

C. C. 548. S. C. 2 Dick. 600. *The Countess of Strathmore v. Bowes*, 2 Bro. C. C. 88. *The Marquis of Downshire v. Lady Sandys*, 6 Ves. 107. *Lord Tunsworth v. Lord Ferrers*, Ib. 419. *Williams v. M<sup>r</sup> Namara*, 8 Vts. 70. *Burges v. Lamb*, 16 Ves. 174. *Day v. Merry*, Ib. 375. *Delapole v. Delapole*, 17 Ves. 150. *The Attorney-General v. The Duke of Marlborough*, 3 Madd. 498.

1818.

## ROLLS.

1818,  
Dec. 17. 18.1819,  
March 19. 26.

One of the conditions on a sale of estates by auction in lots, expressed, that they were subject to the perpetual payment of 120*l.* a-year to the curate of *N.*, but that the same, and the perpetual annual payment of 20*l.* to the hospital of *C.*, were in future to be charged upon, and paid by the purchaser of Lot I. only.

1st. Held, that this did not bind the vendors to procure the other lots to be absolutely exonerated from the payments, but merely such an exoneration and indemnity as could be effected between the purchaser of Lot I., and the purchasers of the other lots.

2d. The Master having settled a deed whereby the purchaser of Lot I. charged it with the before-mentioned perpetual payments, in exoneration of the other lots, and also granted a rent-charge of 140*l.* out of Lot I. to two trustees in fee, with powers of distress and entry, in trust, in case any of the owners of the other lots should be compelled to satisfy any of the annual charges, or incur any costs, &c. on account thereof, the trustees should, when lawfully required, out of the 140*l.* a-year, and by levying it under the powers, or by such other ways as to the trustees should seem meet, raise all such sums, costs, &c. as the purchasers, their heirs, &c. should have been obliged or compelled to pay, or should have sustained, and all the costs of the trustees, and to apply the monies so as effectually to indemnify the purchasers against the yearly payments, and all contributions, &c. on account thereof: with a declaration, that no money should be raised under the trust, unless the trustees should have previously given the owner of Lot I. a month's notice, in writing, of their intention to raise it: with a covenant by the purchaser of Lot I., with each of the others, for payment of the annuities, and for their indemnity against them, and all expences on account of non-payment by him: a power for the trustees to retain their expences, and for the appointment of new trustees by the surviving or continuing trustee, or his heirs. On exception to the Master's report, it was referred back to him to revise, and, if necessary, alter the deed, the Court doubting the sufficiency of the indemnity, 1st. In granting a rent-charge only equal to the payments against which the purchasers were to be protected, without any fund for satisfying their costs. 2d. In appointing but two trustees. 3d. In not giving the purchasers the right of nominating, or joining in the nomination of new trustees. 4th. In restraining the trustees from levying the rent-charge until some of the purchasers should be compelled to make payments. 5th. In making the levying of the indemnity to depend on notice by the trustees, and not by the purchasers.

a Master,

## CASAMAJOR v. STRODE.

UNDER a decree in this cause, estates were sold by auction on the 24th and 25th of *October*, 1811, in forty-seven lots. The eighth condition of sale was in the following words: "The estates comprised in the foregoing particular are subject to the perpetual payment of 120*l.* a year to the Curate or Chaplain of *Northaw*, but the same, and the perpetual annual payment of 20*l.* to the Hospital of *Cheyneys*, in *Buckinghamshire*, are in future to be charged upon and paid by the purchaser of Lot I. only." Lot I. was purchased by *Thomson*, and five of the other lots by *Schneider*. On the 11th of *November*, 1815, an order was made, referring it to

a Master, to see whether a good title could be made to the lots purchased by *Schneider*, and on the 26th of *July*, 1816, it was referred to the Master to settle and approve of a proper deed of indemnity from *Thomson*, the purchaser of Lot I., indemnifying all the other parties who had become purchasers of the residue of the estate comprized in the printed particulars thereof, from the payment of the annual outgoings of 120*l.* and 20*l.*, or any part thereof, in compliance with the conditions of the sale. It appeared that *Schneider* was no party to this order. In *March*, 1817, the Master certified that he had settled and approved of the deed afterwards mentioned, as a proper deed of indemnity; and on the 7th of *May*, 1817, he reported that a good title could be made to the lots purchased by *Schneider*.

To this report *Schneider* excepted, alledging that the Master ought to have certified that a good title cannot be made to those lots.

The deed of indemnity, which was approved of by the Master, was an indenture between *Thomson*, the purchaser of Lot I., of the first part, *Casamajor* and *Fowler*, (trustees for sale of the estates) of the second, the purchasers of all the other lots of the third part, and *P.A. Hanrott* and *John Jones*, of the fourth part, containing, after various recitals deducing the title into the vendors, and of the decree for sale, a recital, that by an indenture dated the 10th of *October*, 1605, the whole or certain parts of the estates were charged with a perpetual annual payment of 20*l.* towards the building and maintaining of an Alms-house at *Cheyneys*, and of the poor people therein; and also that by two other indentures, dated the 4th of *June*, 1752, and the 5th of *July*, 1805, the whole, or certain parts of the estates were charged with the two further perpetual annual payments of 60*l.* and 33*l.* to the stipendiary Curate of the Church of *Northaw* for the time being, in addition to the annual sum of 27*l.* which had been long previously charged thereon, which yearly sums made together 120*l.* It then recited the conditions of sale,

1818.  
CASAMAJOR  
v.  
STRODE.



1818.

CASAMAJOR  
v.  
STRODE.

sale, the purchase of Lot I. by *Thomson*, and the conveyance to him of that lot by the vendors, and the purchases of the other lots by the parties, of the third part: that the vendors, in compliance with the conditions of sale, and for the indemnity of the other purchasers, had requested *Thomson* to charge the yearly sums before mentioned upon the estates comprised in Lot I., which he had consented to do in manner afterwards mentioned: and after further reciting the order of the 26th of *July*, 1816, and the report, it was witnessed, that in compliance with the condition of sale, and in pursuance of the agreement, *Thomson*, at the request of the vendors, and by virtue of a power of appointment contained in the conveyance to him, charged all the estates afterwards described, with the payment of the whole of the annuity of 20*l.*, and of the before mentioned annuities, amounting together to 120*l.*, in exoneration and discharge of all other the hereditaments liable to the payment of the same annuities, or any of them. And it was further witnessed, that in order the better to effectuate such charge, *Thomson* appointed and granted unto and to the use of *Hanrott* and *Jones*, their heirs and assigns, for ever, a clear annuity or yearly rent-charge of 140*l.* to be issuing out of the estates comprised in Lot I.; to hold to *Hanrott* and *Jones*, their heirs and assigns, payable quarterly, the first payment to be made on the 25th of *March* then next, with a power of distress on non-payment for twenty days after any quarterly payment, and a power of entry and perception of rents on non-payment for thirty days. The deed contained a declaration, that the rent-charge of 140*l.* was granted to *Hanrott* and *Jones* upon the following trusts: In case the several parties named in the schedule to the deed, (*viz.* the purchasers), or any of them, their, or any of their heirs, &c. or any persons claiming under them, or any other persons for the time being entitled to, or in possession of the hereditaments comprised in the several lots mentioned in the schedule, should, at any time thereafter, be forced or compelled to pay  
and

and satisfy the said several annuities of 20*l.*, &c. therein before charged exclusively on the premises out of which the annuity of 140*l.* was thereby granted, or any of them, or any part thereof respectively, or any arrears thereof, or should incur, sustain, or be put unto any costs, charges, damages, or expences, on account thereof, then and in such case, from time to time as the same should happen, upon trust, that *Hanrott and Jones*, or the survivor of them, his heirs or assigns, should, from time to time, when lawfully required, by and out of the yearly rent-charge thereby granted, by raising and levying the same, or any part thereof, under the powers before contained, or by such other ways and means as to *Hanrott and Jones*, or the survivor of them, or the heirs or assigns of such survivor, should seem meet, (but not until such notice as thereafter mentioned should have been given), raise and levy all and every such sum and sums of money, loss, costs, damages, and expences, as they, the parties named in the schedule, or any of their heirs, &c. or any persons claiming under them, or other persons for the time being entitled to, or in possession as aforesaid, should have been obliged or compelled to pay, or should have sustained, incurred, or been put to as aforesaid; and all expences whatsoever which *Hanrott and Jones*, or the survivor of them, his heirs, &c. should have incurred or been put unto, in or about the raising and satisfying such monies, or otherwise in or about the execution of the trusts of the deed, and pay and dispose of the monies so raised and levied accordingly, so as well and effectually in all things to indemnify the parties of the third part, their heirs, &c. and all persons claiming under them, respectively, or otherwise as aforesaid, their respective lands and tenements, goods and chattels, from the said yearly sums of 20*l.*, &c. and all arrears and future payments thereof, and all contributions, claims, and demands, on account thereof.

1818.  
  
 CASAMAJOR  
 v.  
 STRODE;

The

1818.

GASAMAJOR  
v.  
STRODE.

The deed also contained a declaration and agreement, that no money should be raised under the trusts, unless *Hanrott* and *Jones*, or the survivor of them, his heirs or assigns, should have previously given to *Thomson*, his heirs, &c. one calendar month's notice or more of their intention to raise the same, and of the amount of the money to be raised; such notice to be in writing, and to be signed by *Hanrott* and *Jones*, or the survivor of them, his heirs or assigns, and to be delivered to *Thomson*, his heirs, &c., or left at his or their usual or last place of abode: and upon further trust, that *Hanrott* and *Jones* should permit the persons for the time being beneficially entitled to the estates thereby charged with the 140*l.* a-year, to retain the same rent-charge until the trust before declared should arise or require to be performed, and also to retain and receive the surplus of the same rent-charge which should remain after and not be applied in or towards the execution of the trusts before declared.

The deed contained a covenant by *Thomson* with each of the other purchasers separately, for payment by *Thomson*, his heirs, appointees, and assigns, of the several annuities when they should become due, and for the indemnity of the other purchasers, and their heirs, executors, &c. and all other persons claiming under them, and all other persons for the time being entitled or in possession, and their respective estates, goods, and chattels, and especially the lands purchased by them at the aforesaid sale, from all the annuities, and all arrears and future payments thereof, and from all actions, suits, &c., losses, expences, &c. on account of the non-payment by *Thomson*, his heirs, &c., or any distress or other proceedings, claim or demand, on account of the same. There was also a power, on the death of a trustee, for the surviving trustee, or his heirs, to appoint new trustees, and a clause enabling the trustees, "in the first place," to retain out of the trust monies, all their expences.

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1818.

CASAMAJOR  
v.  
STRODE.

Mr. *Wetherell* and Mr. *Shadwell* in support of the exception, contended, that according to the true construction of the eighth condition, the purchaser was entitled to have his lots absolutely exonerated from the annuities. They are "in future to be charged upon and paid by the purchaser of Lot I. only." That condition has not been performed. The other purchasers were not merely to have a contract whereby they are still to continue liable to the charges. The vendors might have enabled themselves to perform the condition literally, or they might have stipulated that the estates should be purchased subject to the annuities, but with an indemnity against them. But when they have agreed that the first lot only shall be charged with them, they must be bound by the phrase they have adopted, and the Court cannot hold a purchaser of the other lots bound to take them on any other terms. They are bound to procure a private act of Parliament, if the condition cannot be performed by any other means. But they have not even in substance complied with the condition. The order for the Master to settle an indemnity, does not bind *Schneider*, who is no party to it.

The deed prepared is not a sufficient indemnity. It first charges Lot I. with the annuities, with which it was charged already. So far it is nugatory. An annuity exactly equal to the aggregate amount of the original annuities, is not an indemnity; it is not a sufficient protection against the expences to which the purchasers may be liable. If an annuity of exactly equal amount were put into the hands of the purchasers, it would undoubtedly be a sufficient indemnity, for in such a case no expences could be incurred. But here the purchaser has not the possession of the funds—they are to be raised by trustees to whom he is a stranger. The deed gives merely a power of entry and distress, and the annuity is granted to the trustees, their heirs and assigns. No term of years is given to them for the purpose of enabling them to bring an ejectment. And if the surviving trustee should leave an infant heir, he may be the person by whom

1818.

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CASAMAJOR  
v.  
STRODE.

whom the distress is to be made. It then provides, that if the purchasers shall be "forced or compelled" to pay the annuities, the rent-charge is to be raised. This must refer to compulsion by legal process, which must always be attended with costs. The trustees are to raise it "when lawfully required." Suppose the rent-charge of 140*l.* to become vested in an infant heir, on the death of both the trustees, in what manner is he to obtain payment of it for the purposes of the indemnity? If the rent-charge had been limited for a term of years, there would have been always an adult person capable of recovering it. The costs of the trustees are directed to be raised in the first place.

Mr. Benyon, Mr. Bell, and Mr. Hodgson, for the report, contended, that *Schneider* was, according to the true construction of the eighth condition, bound to accept an indemnity against the annual payments, and could not insist on an absolute exoneration. It is a mere stipulation that the purchaser of Lot I. shall charge it. The vendors have done more than the condition required, they have given an indemnity. The condition merely requires that it shall be charged on and paid by the purchaser of Lot I. only. There is nothing which pledges them to exonerate the rest of the estate. When it is considered in connection with the circumstances, there can be no doubt. The annual sums payable to the Hospital, and to the Curate, are rents-charge, and there is no point clearer than that a person is never advised to release part of the lands out of which the rent-charge issues, because by so doing, the whole rent-charge is extinguished. A complete exoneration therefore could never have been intended. Besides, they are payable, one to an ecclesiastical corporation, and the others to a charity. Supposing the purchaser might have considered himself entitled to exoneration as against the rents-charge if they had belonged to individuals, he could not, when the condition informed him that they belonged to persons incapable of releasing. It is said that they

they might be enabled to release by an act of Parliament. But an application for such an act could not have succeeded. It is contrary to all the rules and Standing Orders of both Houses. No person is competent to consent for these bodies. The legislature would not be satisfied with the consent of the curate. No instance can be shewn for the last century of the passing of such an act. There is another reason against the construction contended for by the purchaser. If the vendors meant that the lots should be completely exonerated, why should the annual payments have been mentioned? On the face of the condition there is notice of its existence. If a vendor means to pay off the incumbrances on his estate, he has no need to mention them in the conditions of sale. As to Lot I., it might be proper so to notify it, but it is a condition addressed to all the purchasers. It could only mean that they should be indemnified. Any instrument making Lot I. liable, and obliging the owner of that lot to refund any damages to the other purchasers, would have been sufficient.

Although *Schneider* was no party to the order for settling an indemnity, that order shews the view which the Court took of the subject. On that reference the matter was much discussed before the Master. There is a fallacy in arguing that if the purchaser is to take an indemnity, he is to have the very best that can be given to him. He is entitled merely to such an indemnity as it is reasonable the purchaser of Lot I. should give him, and so that the purchaser of that lot should not prevent his own estate from being marketable. It is said, that a charge on Lot I. was nugatory. It is an effectual appointment by *Thomson*, under his power, and, at all events, it charges the estate in equity, and enables the other purchasers to come into this Court for indemnity. But it would even at law amount to a grant. If a person seised in fee covenants that his land shall be charged with a rent, in exoneration of another, it would enable the other to dis-train. He would have a power of distress if the land were  
limited

1818.  
CASAMAJOR  
v.  
STRODE

1818.  
  
 CASAMAJOR  
 v.  
 STRODE.

limited to the use and intent, that the intended grantee *may* receive the rent as an indemnity. If, however, the point were doubtful at law, it is clear in equity.

The benefit of *Thomson's* covenant for payment of the annual sums, and to indemnify the purchasers, would run with *Schneider's* estate, and all persons claiming under him would be entitled to the benefit of it, unless they should preclude themselves by the form of the conveyances to be made to them. It is a covenant which respects something issuing out of the land, and a damage relating to it, and falls therefore within the rule in *Spencer's* case (a). It may be reasonably contended that the covenant would also run with Lot I., so as to bind at law all future owners of that property, but it is not necessary to argue that point, as Lot I. is effectually charged by the first clause of the deed. But it is contended, that the indemnifying rent-charge, being only 140*l.* a-year, is not a sufficient indemnity against annual payments of the like extent. But the demand of each purchaser could never be for more than a portion. Lot I. is the largest lot, and must consequently bear at all events, its original proportion of the charge, so that the indemnifying rent must necessarily exceed what may be paid by each purchaser. The intention was that the purchaser of Lot I. should not suffer by any laches of the other purchasers, in not seeing that the charges were duly paid. It is their duty to see that their indemnity is always operating. With regard to the objection that the costs of the trustees are payable "in the first place," no deed of trust is prepared without containing a provision for the costs of the trustees, for no person would otherwise accept the office. It is further objected that Lot I. should have been made subject to a term of years. But that would have rendered Lot I. unmarketable: it might even have been the ground of the owner of that lot being nonsuited in an action of ejectment. So long as it is

(a) 5 Co. 16.

subject merely to a charge, it is marketable. In deeds of indemnity, it is not usual to create a term. The purchaser of Lot I. never contracted that his estate should be subject to a term. The possibility of the rent-charge becoming vested in an infant is provided against by the power given to the surviving trustee to appoint a new one, which he could be compelled to exercise in case of refusal. But this inconvenience is inseparable from the grant of a rent-charge in fee. If it should become vested in an infant heir, a distress might be made by his guardian. It is said that there is nothing to invite the owners of the annual payments to take them in the first instance from the proprietor of Lot I. But that lot consists of the mansion house and the patronage of the church, and it is more likely that the proprietor of that lot should be resorted to.

1818.  
CASAMAJOR  
v.  
STRODE.

Mr. *Wetherell*, in reply. The objection that Lot I. may be rendered unmarketable, is of no force, if the purchaser of that lot has bought it subject to a condition which may have that effect. The conditions of sale give him full notice of what the other purchasers have a right to require. The vendors have sold subject to a condition which we now require them to perform. Our demand is against the vendors, and if Lot I. is perfectly ruined, that circumstance affords no argument against our claim. The vendors are bound absolutely to exonerate the other lots from the charges in question, and for that purpose to obtain an act of parliament if it be necessary. Though the legislature would not require a charity to narrow its security, yet if the vendors were to hold out some additional advantage to the charity, by commuting their security on this large estate, for a better security on a smaller estate, the legislature might be induced to afford its sanction. In this Court, references are frequently made to enquire whether, even in a case where an infant's interests are to be affected, an act of parliament should not be applied for. The trustees of the charity would, if some additional  
emolument



1818.  
  
 CASAMAJOR  
 v.  
 STRODE.


emolument should be offered to the charity, consent to an act for releasing the estates in question; and the vendors are bound to purchase the exoneration, if it be practicable. It would undoubtedly be a breach of trust, if the trustees were to release without receiving an equivalent; but there is no reason to doubt, that if the legislature should be satisfied that an equivalent was secured to them, they would be compelled to release. Exchanges of lands by ecclesiastical persons, colleges, and other institutions, are, in strictness, breaches of trust; yet acts of parliament for effectuating them were not uncommon, before Lord Egremont's act (a) prevented the necessity of such application. A private act is a mere conveyance. If the vendors have undertaken to procure a release, they are bound to procure it at any expence in the case of a private conveyance; why should they not be equally bound if it must necessarily be done by act of parliament? It has never been held, that such a stipulation is to be construed as referring to private conveyances merely.

But supposing the vendors are not bound to obtain a complete exoneration, the next question is whether the deed which has been prepared, is the best security, short of a complete exoneration. The rent-charge granted as an indemnity is only equal to the other annual payments, whereas it ought to have been of sufficient amount to cover all the expences. The trustees are only empowered to raise their own expences, and not those which may be incurred by the purchasers. A covenant for payment of the expences is not sufficient; for the benefit of such a covenant can only be obtained by an action at law. There should be a charge commensurate with the costs. In *Brewster v. Kitchell* (b), it was held by Holt C. J. that the heir of the grantee of a rent-charge could not maintain an action of covenant against the assignee or lessee of the grantor, upon a covenant for payment of the rent-charge, but only against the grantor and

(a) 55 Geo. III. c. 147.

(b) 1 Salk. 198.

his heirs. In the present case the covenant relative to the costs, would not run with the land, because the grant makes the land liable to the rent-charge merely, and shews it to be the intention that it should not be liable to the costs, and that the covenant was to be merely personal. If the vendors will not carry the condition into effect by procuring the estate to be released, it is an incurable defect. They have contracted that the estate should not be subject to any rent-charge. A rent-charge is a defect of title. The conditions amount to a warranty, and the objection is the same as if the estate had been sold as freehold, and had afterwards proved to be leasehold, in which case the Court would not have compelled the purchaser to accept it. It is a defect in the quality of the estate.

1818.  
  
 CASAMAJOR  
 v.  
 STRUDE.

*The MASTER of the ROLLS.*—My present impression is, that the vendors were not bound to procure an act of Parliament for exonerating the lands from the annual payments. These were not dormant incumbrances, but incumbrances of the existence of which the contracting parties were fully aware, and it was distinctly presented to the view of the purchasers that they were incumbrances of an unalienable nature. They purchased with full knowledge of these facts. The owners of the incumbrances were no parties to the transaction. The exoneration referred to must therefore be taken to mean an exoneration as between the purchasers themselves. All the purchasers are to remain liable as between themselves and the persons entitled to the annual payments, but as between the different purchasers, the owner of the first lot is to pay the whole. An exoneration as to the owners of the annual payments could not be contemplated. It is not to be inferred from any part of the condition that an exchange was to be negotiated with, or a bonus to be offered to, the persons entitled to the annual payments, for any provision in lieu of them; for the condition expressly provides that the annual payments are to "be charged upon  
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1818.  
 CASAMAJOR  
 v.  
 STRODE.

and paid by the purchaser of Lot I. only." There is nothing to shew that any lands were to be purchased for the charities, or any bonus to be given to them for relinquishing part of their security. The reasonable construction is that as the whole estate is subject to annual sums payable to persons who are incapable of releasing them, they are in future to be paid by the owner of Lot I. only, and that the purchasers shall, as between themselves, do all acts which they are capable of doing for effectuating the exoneration. That is within the terms of the contract. The purchaser of Lot I. buys with knowledge that he is to indemnify the other purchasers, and to reimburse them all payments they may make, and all their costs. When this principle is once ascertained, the rest is mere mechanism. It is sufficient if the burthen be thrown on Lot I., and if the other purchasers are protected against the consequences of liability to the annual payments, and against all the costs not only of the trustees, but of the purchasers themselves in consequence of any neglect on the part of *Thomson*. They must be indemnified not only in respect of the sums they may pay on account of the rent-charge, but of all the costs. As *Thomson*, however, is not now before the Court, the question relative to the sufficiency of the deed of indemnity cannot properly be agitated. For that purpose it will be necessary that a petition should be presented, bringing *Thomson* before the Court.

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The exceptions stood over with liberty to present a petition for the purpose of bringing *Thomson*, the purchaser of Lot I., before the Court.

1819.  
 March 19.

A petition having accordingly been presented by *Schneider*, praying that *Thomson* might be ordered to perform the eighth condition of sale, the matter was again argued by Mr. *Wetherell* and Mr. *Shadwell* in support of the exception, by Mr. *Benyon*, Mr. *Bell*, and Mr. *Hodgson* for the vendors,  
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bid by Mr. Preston for the purchaser of Lot I. It was contended on behalf of the latter, that the legislature would not have passed an act of Parliament for throwing the whole of the annual payments on Lot I., for there might have been an eviction of that lot by a paramount title; that in all events it was enough for Thomson to say that he was not bound by the condition to execute any more extensive indemnity than was contained in the deed already prepared.

1818.  
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CABAMAJOR  
v.  
STRODE.

The case stood for judgment.

*The MASTER of the ROLLS.*—The first question is, whether the condition is to be considered as referring to an exoneration as against the owners of the annual payments, or merely to an exoneration as between the purchasers themselves. I think it must mean that sort of liability which they could contract for *inter se*. It does not express that there is to be a complete exoneration, and there will inevitably be some risk; but the question is, what must be taken to have been the meaning of these parties; and whether it must not be the same as if they had said that as between the purchasers in general and the owners of the annual payments, the purchasers are to be liable, but that they would do all in their respective powers to effectuate an exoneration as between themselves. Considering the nature of the payments, and the description of persons entitled to them, I think the clause must admit of the limited construction I have put upon it. It frequently happens, that on the sale of an estate which is subject to a charge, for instance, that of repairing a chancel, a stipulation is made that part of the estate shall be exonerated from it, but was it ever contended that the vendor was bound in such a case to procure an act of Parliament for exonerating it from the charge? or is there any instance of such an act having been passed? The Court must be furnished with authority before it can impose such an obligation on a vendor. Of the two constructions of which the con-

1819.  
March 26.

1818.  
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 CARAMAJOR  
 v.  
 STRODE.

dition is capable, this appears to me the most natural and obvious, and though there will not for all purposes be an exoneration of the lots in question, they will, in substance, and for most purposes, be effectually exonerated.

Supposing then, that indemnity and arrangement were intended, another question arises, whether the proposed deed sufficiently answers those purposes? The purchasers are undoubtedly entitled to the best protection which the vendors can give them, and the question is, whether the deed which has been prepared, does afford that protection? *Schneider* stood in a very singular predicament. He was no party to the order of reference for settling the deed of indemnity, and had therefore no opportunity of suggesting objections to its provisions. Considering it to be a deed by which his estate was to be protected against annual payments, amounting to 140*l.*, it is reasonable that he should have an opportunity of discussing any objections to which he might consider the deed as being liable. The question now is, whether the deed is free from objection? The Court cannot be called on to settle the deed, and to prescribe the form in which it should be worded. If there be any ground for supposing that it might have been more accurately framed, the question will be, whether *Schneider* should not have an opportunity of going before the Master to obtain a more complete indemnity? It is objected that the rent-charge granted as an indemnity, is a rent charge in fee, and not for a term of years. I think, however, that had it been granted for a term, it would have been objectionable, for then the indemnity would have been temporary, though the charge is perpetual. It is more correct that the indemnity should be co-extensive in quantity of estate with the charges against which the purchasers are to be protected. A perpetual rent charge has been granted in fee-simple issuing out of lands of sufficient value, with a power of distress and of perception of rents in case of non-payment.

Another

1818.

CASAMAJOR  
v.  
STRODE.

Another objection is made, and which I think deserves further consideration. It is said not to be sufficient that the indemnifying rent charge should be only co-extensive in amount with the original annual payments. How are the purchasers to be indemnified by an annual sum of 140*l.* against not only other annual payments amounting to 140*l.* but all the costs which may be occasioned by the claims to be made upon them? They are not to call on *Thomson* for payment till payment shall be enforced against themselves. They are first to resist the demand. The resistance, and the distresses to be made upon them, must necessarily produce expence. Every stage must occasion expence. There may be much expence in ascertaining the heir at law of the surviving trustee, who is to convey on the appointment of new trustees. It is difficult to say, considering the possible extent to which litigation may go, that the purchasers are sufficiently indemnified by the grant of a rent charge of equal amount with the annual sums charged on the whole estate. The costs are directed to be paid out of the rent charge, and yet it is only to the amount of 140*l.* a year. What objection would there be to grant the right of distraining for the 140*l.* and all necessary costs? The purchasers would then have a complete security. It is for the consideration of the Master whether he ought not to extend the indemnity to cover every ultra liability. There is some doubt whether there should not be a greater number of trustees. There may be considerable inconvenience if the trustees should be out of the kingdom. Notice is required to be given by the trustees to the owner of Lot I., before the rent charge can be levied. This may be attended with considerable inconvenience in the case of a trustee being out of the kingdom, or in the case of the survivor's dying and leaving an infant heir. In such a case, and also in the possible case of a total extinction of the heirs of the surviving trustee, what is the situation of the purchasers? The nomination of new trustees is to be by the survivor, or the heir of the survivor, without the concurrence or approval of the parties materially interested, who are

1818.  
 CASAMAJOR  
 v.  
 STRODE.

thus to have trustees put upon them for the execution of *this* important trust. There should be some security *against* these contingencies, by the appointment of a greater number of trustees, or by having them from time to time renewed. The question is, whether there should not be some modification of the deed on these points, and whether the notice for levying the rent charge should not be by some purchaser who is called on to pay, but before he has been actually compelled, and whether it should not then be imperative on the trustees to act upon the notice by raising the money required? These are circumstances which appear to me to deserve consideration. These observations have occurred to me on a perusal of the deed. I do not say what weight belongs to them, or that they are the only observations arising out of it. The deed is in general well adapted for the purposes to be answered by it, but it may require to be modified. I think that the eighth condition should have the limited construction I have put upon it, but that it entitles the purchasers to every possible indemnity which a conveyance can give them.

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“His Honour doth order, that the exception taken by — *Schneider* to the Master's report of the 7th of *May*, 1817, so far as relates to the title of the premises purchased by him, be over-ruled: and it is ordered, that it be referred back to the Master to review his report dated the 3d of *March*, 1817, as to approving of the deed of indemnity in the petition mentioned: and it is ordered, that the said Master do revise, and if he shall judge necessary, alter the said deed in such manner as the said Master may think proper: and it is ordered, that the said *P. Thomson* do perform the said eighth condition of sale in the petition mentioned, for causing the annual payments in the petition mentioned, to be charged upon and paid by the owners of Lot I. only, by executing such deed of indemnity when so revised or altered, or as finally settled by the said Master as he shall direct.”

[Reg. Lib. A. 1818, Fol. 1896.]

1818.

WALTER v. HODGE.

Rolls.

June 29,

July 1, 6, 21.

THIS suit was instituted by the residuary legatees of *Robert Piercy Hodge* against his executors, one of whom was *Martha Hodge* his widow, for an account of his personal estate ; and the only question was respecting the right of the defendant *Martha Hodge*, to retain, for her own benefit, a sum of 600*l.*, under the following circumstances. The bill charged her with having possessed bank notes and ready money of the testator, which were in his dwelling house at the time of his decease, to a considerable amount. By her answer she stated, that the testator some short time before his death, gave to her a book containing bank notes, to the amount in the whole of 600*l.* or thereabouts; that at the time he gave her the bank notes, he informed her that they were for her own private use, and that he gave them to her to be at her own disposal, or used expressions to that effect; that she did, during the testator's life-time, expend in various ways some part of the bank notes, and that at the time of his death, some of them remained in her possession; that she considered such bank notes as her own separate property, expended them for her own private use, and was wholly ignorant that they legally were the property of the testator at the time of his death, but considered the same as her own exclusively; and she submitted to the judgment of the Court, that under these circumstances, such bank notes so given to her were her own separate property,

To a bill against a widow, who was one of her husband's executors, for an account of his personal estate, she put in an answer stating that the testator, shortly before his death, gave her bank notes amounting to 600*l.*, saying, " they were for her own private use, and that he gave them to her to be at her own disposal," and therefore claiming them as her own separate property. A witness gave the following account of the transaction:— that the testator first gave his wife a note-case containing part of the notes, saying, " that if any thing should happen to him, the contents of

the note-case were to be her's," and shortly afterwards, on the same day, gave her other bank notes, saying, " these are to be your's also," but the witness did not state the amount of the notes.

Held, that the wife was not entitled to the 600*l.* either as a *donatio mortis causâ*, or as an absolute gift by her husband to her separate use, the most clear and satisfactory evidence being necessary to establish it either as the one or the other

Whether it was competent to the wife, after the statement and claim in her answer, to give evidence to establish the gift as a *donatio mortis causâ*, *quære?*

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1818.  
  
 WALTER  
 v.  
 HODGE.

and were not the property of the testator at the time of his death; and that the defendant ought not to be called upon to account for the same.

*Alice Mason* deposed, that being on a visit at the testator's house, she was present and saw the testator take out of his coat pocket and deliver into the defendant's hands, a black leather note-case, containing some Bank of *England* notes; that they were so delivered about eleven days prior to the testator's death, and that when he so delivered them, he told the defendant, *Martha Hodge*, in the hearing of the witness, that if any thing should happen to the testator, the contents of the note-case were the defendant's. The witness stated, that she could depose that the contents of the note-case consisted of Bank of *England* notes, because, on the defendant's opening the note-case almost immediately afterwards, to put in other Bank of *England* notes, as afterwards mentioned, the witness saw some Bank of *England* notes in such note-case; that the testator had on the same day on which he delivered the note-case and bank notes, been to the Bank of *England* for the purpose of selling out and that he did sell out some part of his property in the funds; and it being then a rainy day, and the testator being wet with the rain, he took off his coat and delivered it to the witness immediately after he had given the note-case and bank notes to the defendant; that instantly after he had delivered his coat to the witness, he took some other Bank of *England* notes out of his coat pocket and delivered them to the defendant, at the same time saying to her, in the deponent's presence and hearing, "These are to be your's also;" that the defendant then opened the note-case and placed in it the last-mentioned bank notes; that the testator was at that time, and had been for some time previous, in a poor or indifferent state of health. The witness stated, that she understood by the expressions used by the testator, that he intended that the defendant was to have and keep the note case and all the bank notes for her own use, in case of the testator's death.

At

At the hearing of the cause on the 14th of *May*, 1816, the usual decree was made for an account of the testator's personal estate possessed by the defendants, and the plaintiffs having brought in before the Master a charge against the defendant *Martha Hodge*, for the 600*l.* in question, which she claimed as a *donatio mortis causâ*, an order was made on the 22d of *March*, 1817, that the Master should be at liberty to make a separate report as to the personal estate of the testator, possessed by the defendant *Martha Hodge*. The Master having accordingly made a separate report, in which he did not charge the defendant with the 600*l.* the amount of the bank notes possessed by her, the plaintiffs took an exception to his report.

1818.  
WALTER  
v.  
HODGE.

*Mr. Hart* and *Mr. Wingfield* in support of the exception. The Master's report proceeds on the supposition that the delivery made to the defendant was a *Donatio mortis causâ*; but in order to constitute a valid donation of that description, the donor must, in the expectation of death, deliver the subject to the donee, on condition of its being restored to him in case of his recovery. Here the notes were put into the defendant's hands to do as she pleased with, and without being subject to any condition.

*Mr. Bell*, *Mr. Shadwell*, and *Mr. Girdlestone*, for the report, contended, that it was sufficient if, when the gift was made, the testator contemplated his death; and that the form of words by which it is made was immaterial. And they referred to the definition of a *Donatio mortis causâ*, in *Justinian's Institutes* (a). "*Mortis causâ donatio est, quæ propter mortis fit suspitionem: cum quis ita donat, ut si quid humanitûs ei contigisset, haberet is qui accepit. Sin autem supervixisset is qui donavit, reciperet.*" They also referred to the following definition in *Bracton* (b): *Mortis causâ do-*

(a) *Lib. II. tit. VII. 1.*

(b) *Lib. II. c. 26.*

1818.

WALTER  
v.  
HODGE.

natio potest esse multiplex, ut si quis contemplatione vel suspitione mortis alicui dat, cujusmodi donationes sæpe fiunt ab ægrotantibus, vel ab eis qui in aciem sunt ituri, vel peregrè profecturi, et in se tacitam habent conditionem, ut hujusmodi donationes revocentur si ægrotus convalescit, si miles ab acie redierit, si nauta a navigatione, et peregrinus a peregrinatione." It cannot be denied that in the present case there was a *contemplatio* or *suspicio mortis*; the testator was ill when the gift was made, and he died eleven days afterwards. The cases of *Ward v. Turner (a)*, and *Hill v. Chapman (b)*, were also referred to.

July 1.

*The MASTER of the ROLLS.*—From the proceedings I collect that the plaintiffs were unable to fix the defendant *Mrs. Hodge*, with the receipt of the bank notes, except from her answer. The decree is drawn up on reading the answer; those parts of it therefore which are favourable to her must be taken into consideration, as well as those which are unfavourable to her claim. The question depends on the account of the transaction given by the defendant, and by the witness *Alice Mason*, there being no other material evidence on the subject. The answer represents it as an absolute gift to take effect immediately, and does not contain a word to shew that it was conditional, and to depend on the testator's death, or that any intention was expressed by him that the enjoyment of it should be postponed until that event. On the contrary, it is stated, that *Mrs. Hodge* was to have power to dispose of the bank notes immediately; and she admits that she did in point of fact dispose of part of them before the testator's death. The account given by *Alice Mason* differs from that given by the answer in some very material points. The defendant represents the whole of the bank notes as having been contained in the book, and that they formed one entire gift; the witness, *Alice Mason*, on the other hand, represents that there were two gifts with an in-

(a) 2 Ves. 431.

(b) 2 Bro. C. C. 612.

terval between them; that the testator, after the first gift, took off his coat, and then delivered other bank notes to the defendant, which she placed in the book he had before given to her. A more material variation is, that the witness *Mason* alone introduces words making the gift conditional, "if any thing should happen to him," evidently alluding to his death.

1818.

WALTER  
v.  
HODGE.

It is clear, that a person setting up a parol gift of this nature, not contained in any will, must make out a clear and satisfactory case. And the question is, considering these contradictory representations, whether that is done in the present instance. If the claim of *Mrs. Hodge* is to rest solely on the account given by herself, it is an absolute gift by a husband to his wife during the coverture, without the intervention of a trustee, and which, under the circumstances of this case, it would, I apprehend, be difficult to support. The defendant does not by her answer claim it as a *Donatio mortis causá*, but as an immediate, absolute, and unconditional gift of property to her separate use. It is not until the Master is proceeding to take the account, that she claims it as a *donatio mortis causá*. Whether it was competent to her to adduce evidence in support of a claim different from that which she had made by her answer, is a very questionable point; and there is on that account a difficulty *in limine* in receiving the evidence of *Alice Mason*, without a case being laid for it in the pleadings. Her testimony, however, if taken alone, does not prove what can support the claim. She does not state the amount of the notes, whether it was five pounds or five hundred. She says there were two distinct gifts, the second being made by the words, "These also are to be your's." According to her account the gift seems to have been conditional, and the question would be, whether it falls within the description of a *donatio mortis causá*.

I have looked through the cases on that subject, which are not very numerous. Some of these come near the present, without

1818.  
  
 WALTER  
 v.  
 HOBGE.

without being quite similar to it. Those which resemble it the most are *Lawson v. Lawson* (a) and *Miller v. Miller* (b). Some passages in *Lawson v. Lawson*, respecting which Lord Hardwicke felt a difficulty (c), are explained in *Tate v. Hilbert* (d) on a reference made by Lord Loughborough to the Registrar's book. The whole doctrine respecting *donationes mortis causæ* was discussed by Lord Hardwicke in *Ward v. Turner* (e), in which he decided that there must be a delivery by the donor. The gift must also be conditional, depending on the event of the donor's death. The judgment of Lord Loughborough in *Tait v. Hilbert*, removed the difficulties which had before occurred, relative to the definition of this species of gift; and his Lordship in that case determined against the claims of the donees, because the gifts were made to take effect immediately, and had no reference to the death of the donor.

In *Ward v. Turner*, Lord Hardwicke laments that the statute of frauds which subjected nuncupative wills to so many restrictions, did not abolish gifts of this description. They may undoubtedly lead to great abuses, and may be made the means of evading the provisions of the statute. Lord Hardwicke seemed to think that one witness was not sufficient, and that if there was a doubt on the question of fact, he would send it to an issue. But he ultimately decided the case on the ground that there was not a complete delivery.

In the present case it is clear from the answer, that this gift has not the requisites of a *donatio mortis causæ*. It was not to depend on the testator's death; and though an inference might be raised in some cases that death was the event on which the gift was intended to operate, although it was not so expressed, there is no sufficient ground for such a conclusion in the present case. The testator, on the same day

(a) 1 P. Wms. 441.  
 (b) 3 P. Wms. 612.  
 (c) 2 Ves. 441.

(d) 2 Ves. Jun. 120.  
 (e) 2 Ves. 431.

and which appears to have been rainy, was able to leave his house on an occasion of business, namely, to make a transfer of stock; on his return he took the bank notes in question out of his pocket, and gave them to his wife, with a declaration that she was to apply them to her separate use. She understands him to refer to a present and immediate application of them, and accordingly converts part of them to her own use, without waiting for his death. That event does not seem to have been in his contemplation. The evidence of *Alice Mason* is very loose. Though she speaks of a conditional gift, she proves nothing with regard to the subject of it, except that it was of some bank notes, but the amount of which she does not state. Her statement materially differs from that of the defendant. In a case of this description, where there must be much caution in establishing a precedent, I cannot consider that the defendant has satisfactorily made out her claim. The utmost that could be done for her would be to give her an opportunity of trying the question at law in an issue. But my difficulty is, whether I can attend to the evidence in support of that which was not put in issue by the answer? I do not see how I could receive it. But as that point was not argued, I will not preclude counsel from speaking to it. Unless, however, that difficulty can be removed, the exception must be allowed.

1818.  
WALTER  
v.  
HODGE.

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Mr. Bell, Mr. Shadwell, and Mr. Girdlestone, now argued that this was a good gift by the husband to the separate use of the wife. It is not necessary that the husband should contract or engage with any other person. In *M'Lean v. Longlands* (a), Lord Alvanley decided against the claim of the wife, because it rested merely on evidence of declarations of an intention to give, without any actual gift; but it was not denied in that case that a gift might be made by a husband to his wife, without the intervention of a trustee. Lord Al-

July 6.

(a) 5 Ves. 71.

1818.  
  
 WALTER  
 v.  
 HODGE.

*vanley* said that nothing less would do than a clear irrevocable gift either to some person as a trustee, "or some clear and distinct act of the husband, by which he divested himself of his property, and engaged to hold it as a trustee for the separate use of his wife." In *Lucas v. Lucas (a)*, Lord *Hardwicke* held, that a transfer of South Sea Stock by a husband into the name of his wife, was good against the husband, and said, "that in this Court gifts between husband and wife had often been supported, though the law does not allow the property to pass." A Court of Equity acknowledges and establishes contracts between husband and wife. It is clearly settled, that in this Court a provision for a wife will be supported, although it is made without the intervention of a trustee. In *Rich v. Cockell (b)*, the Lord Chancellor stated it to be perfectly settled that a husband may in this Court, be a trustee for the separate use of his wife.

Mr. *Hart* and Mr. *Wingfield*, *contrà*. In *Lucas v. Lucas*, the investment was in the name of the wife. She had the legal interest, and which could not be brought back without the assistance of the Court. With regard to *M'Lean v. Longlands*, there does not exist in this case that "clear and distinct act" to which Lord *Alvanley* there alludes. Here is no deed, nor evidence of any act *inter vivos*.

July 21.

*The MASTER of the ROLLS*.—I have examined all the cases which have been referred to on the subject of gifts by husbands to the separate use of their wives, and I cannot arrive at the conclusion that there is sufficient evidence of such a gift in this case. I will shortly advert to the authorities, to shew that I do not deny that a gift by a husband to his wife's separate use may be supported in this Court, but that the evidence is not sufficient to bring the present case within the principle of those authorities. In *M'Lean v.*

(a) 1 *Atk.* 270.

(b) 9 *Ves.* 375.

*Longlands*,

*Longlands*, the Court did not think there was sufficient ground for directing an issue to try the wife's claim. That case was mentioned to shew that a gift by a husband to his wife might be supported, for if it could not, it would have been unnecessary to advert to the evidence, or to decide the case on the ground of its insufficiency. Lord *Alvanley* there expressed himself thus:—"The only point on which I entertain any doubt is as to the gift, but I do not think there is sufficient ground to direct an issue. Nothing less would do than a clear irrevocable gift either to some person as a trustee, or some clear and distinct act of the husband, by which he divested himself of his property, and engaged to hold it as a trustee for the separate use of his wife." That is the general doctrine, as stated in one of the latest cases on this subject. There are other decisions to which I do not advert, as they only determine that a wife may in this Court acquire separate property, and that the husband may be a trustee for her. Another case cited was *Lucas v. Lucas (a)*, in which Lord *Hardwicke* said, that in this Court gifts between husband and wife had often been supported, though the law does not allow the property to pass, and he adds, that it was so determined in the case of *Mrs. Hungerford*, and in *Lady Cowper's case*, before Sir *Joseph Jekyll*, where gifts from Lord *Cowper* in his life-time were supported, and reckoned by this Court as part of the personal estate of Lady *Cowper*. In *Slanning v. Style (b)*, the husband, who was a farmer, had allowed his wife to dispose and make profit of certain articles of the produce of his farm for her separate use, by way of pin money, and had borrowed 100*l.* part of her savings, which after his death she claimed to have repaid to her. And Lord *Talbot* decreed that she was well entitled to come in for it as a creditor, observing, "that the Courts of Equity had taken notice of and allowed *femes covert* to have separate interests by their husband's agreement; and this 100*l.* being

1818.

WALTER  
v.  
HODGE.

(a) 1 *Atk.* 270.(b) 3 *P. Wms.* 334.



1818.

WALTER  
v.  
HODGE.

the wife's savings, and there being evidence that the husband agreed thereto, it seemed but a reasonable encouragement to the wife's frugality; and such agreement would be of little avail were it to determine by the husband's death; that it was the strongest proof of the husband's consent that the wife should have a separate property in the money arising by these savings, in that he had applied to her, and prevailed with her to lend him this sum, in which case he did not lay claim to it as his own, but submitted to borrow it as her money." In *Rich v. Cockell* (a), Lord Eldon stated that "it is perfectly settled that a husband may, in this Court, be a trustee for the separate use of his wife." The cases cited on the former argument seem to have proceeded on a contrary supposition. In *Miller v. Miller* (b), Sir Joseph Jekyll says, "The gift of the 600*l.* was a *donatio causâ mortis*, which operates as such, though made to a wife, for it is in nature of a legacy;" and in *Lawson v. Lawson* (c), the same learned Judge held, that the delivery of a purse by the husband to his wife was good, "and must operate as *donatio causâ mortis*, *ut res magis valeat, &c.* because otherwise, one could not give to his own wife." It is unnecessary to observe on the rule of the common law, which prevents a man from making a gift to his wife during the coverture. It is thus stated by *Littleton* (d); "A man may not grant nor give his tenements to his wife during the coverture, for that his wife and he be but one person in the law." And Lord Coke, in commenting on this passage (e) says, "This opinion is clear, for by no conveyance at the common law a man could, during the coverture, either in possession, reversion, or remainder, limit an estate to his wife." All the cases referred to are instances of the exceptions which are made in this Court to the general rule of law, and they are, chiefly, cases relating either to paraphernalia, or trinkets, or to pin money, and savings arising

(a) 9 *Ves.* 375.(b) 3 *P. Wms.* 336.(c) 1 *P. Wms.* 441.(d) *Sect.* 168.(e) *Co. Litt.* 113 a.

from it. *Lucas v. Lucas* is the only case cited which was an instance of direct gift by the husband to the wife. In that case the South Sea Stock was transferred by the husband into the name of his wife. It was considered as amounting to an agreement by the husband that he would be a trustee of the stock for her. That case seems to fall within Lord *Alvanley's* principle, that there must be a clear and distinct act of the husband by which he engaged to hold it as a trustee for the separate use of his wife. The question then is, whether such a clear and distinct act is established in the present case? The claim, as stated by the answer, is very suspicious. The accounts given by the defendant and by the witness *Alice Mason* are quite contradictory; the former stating the transaction to have been an absolute gift to take effect immediately, the latter as a conditional gift of something (but of what in particular she is ignorant) to take effect in case any thing should happen to the donor. To which of them is the Court to give credit? If I were to hold that this was an immediate and absolute gift by the testator for the separate use of his wife, my determination must be founded on the testimony of the wife herself, and in opposition to that of another witness. In a case of this sort, the Court always expects the most clear and satisfactory evidence; and a mere delivery by a husband to his wife is far from being conclusive, the possession of the wife being in general the possession of the husband. The defendant, after her husband's death, sets up a parol gift of part of his property, supported principally, if not altogether, by her own evidence. I am of opinion that the Court cannot give effect to it, and consequently that the exception to the report of the Master, who has omitted to charge her with the amount of the bank notes in question, must be allowed.

1818.  
  
 WALTER  
 v.  
 HODGE.

1818.

ROLLS,  
Dec. 1.

BIRD v. HUNSDON.

Bequest of residue "to be put into government security, and the interest to be paid duly to bring up and educate M., her uncle to be her guardian, and the said M. to have the said interest to maintain her as long as she lives single and no child; and when it shall please God to call her, that money shall come to my brothers and sisters children."

The testator's next of kin were his brothers and sisters. He had several nephews and nieces, who were not his next of kin. He gave a legacy to one of his brothers.

Held, that M. although she married and had a child, was entitled for her life to the interest of the residue, but had no claim to the principal.

**JOHN HUNSDON** by his will dated 10th September, 1800, after appointing his brother *Peter Hunsdon* and *Samuel Seabrook*, executors, and giving his brother *Peter* 50*l.* and *Samuel Seabrook* 30*l.* and providing for the payment of his debts, and for the maintenance of his father, and giving some other legacies, expressed himself as follows:—"I also leave *Mary Brand*, wife of *Robert Brand*, the sum of 10*l.* and daughter of my brother *Edward*, and *Mary Brand*, equal share with all the rest: I also desire to leave *Ann Morris*, daughter of widow *Mary Morris*, of *Bentry Heath*, the sum of 10*l.*, late wife of *John Morris*, and *Samuel Seabrook* to be her guardian, and put it out, and when my funeral and all my just debts and legacies are paid, that the rest of money to be put into government security, and the interest to be paid duly to bring up and educate *Mary Morris*, daughter of widow *Mary Morris*, and *Samuel Seabrook*, her uncle, to be her guardian, and the said *Mary Morris* to have the said interest to maintain her as long as she lives single and no child; and when it shall please God to call her, that money shall come to my brothers and sisters children, all share alike, and their uncle *Peter* to be their guardian."

The testator, at the date of his will, and at his death, had three brothers and three sisters, who were his only next of kin. He had also several nephews and nieces, the children of those brothers and sisters, one of which nieces was *Mary Brand*, the legatee. *Mary Morris*, the daughter, attained the age of twenty-one on the 16th of November, 1812, and on the 6th of October, 1816, she married the plaintiff *John Bird*.

The

The original bill was filed in 1817, by *John Bird* and *Mary* his wife, against the surviving executor, the next of kin, and the nephews and nieces of the testator, praying a declaration that under the will, in the events which had happened, the plaintiffs were entitled to the clear residue of the testator's personal estate, and a transfer accordingly. The defendants by their answer submitted that the interest of the money being given to the plaintiff *Mary Morris* as long as she should live single, all her right and interest in the money ceased on her marriage.

1818.  
BIRD  
v.  
HUNSDON.

After the bill was filed, the plaintiffs had a son. A supplemental bill was filed on the 3d of *April*, 1818, bringing that fact before the Court, and alledging, that on the happening of that event, the plaintiff's right to the residue of the testator's personal estate became fully established. The defendants, by their answer to the supplemental bill, alledged the event to be wholly immaterial, and claimed the same benefit as if they had demurred.

*Mr. Horne* and *Mr. Shadwell* for the plaintiffs, contended, that on the whole will the intention was to give *Mary Morris* the residue absolutely in every event but one, namely, if she should die without having had a child, and that event being now impossible, the plaintiffs were entitled to a transfer of the fund. The testator could not have intended that she should have the interest to maintain her whilst she should be single, but that on her marriage and the birth of a child, both principal and interest were to go over to other persons.

*Mr. Hart* and *Mr. Treslove* for the next of kin and the nephews and nieces, contended, that there were no words in the will to entitle *Mary Morris*, in any event, to more than the interest; and that on the true construction of it, she had, by her marriage and the birth of a child, ceased to be entitled even to the interest. There is nothing absurd in such a disposition. The testator might have meant to provide her with

1848.  
  
 BIRD  
 v.  
 HUNSDON.

a maintenance as long as she remained single; that if she married, she might be maintained by her husband, and that if she became the mother of a child without being married, she would no longer deserve to be an object of the testator's bounty.

*The MASTER of the ROLLS.*—There are two questions on the construction of this will; first, what is the subject of the bequest; and secondly, for what period it is given. Upon the first question, I am of opinion that the gift is confined to the interest, and does not extend to the capital. The testator, after giving various legacies, directs the residue of his property to be laid out on Government securities. He then proceeds to direct what is to be done with the interest. It is to be applied for the maintenance of *Mary Morris*; and he directs, that on her death, "that money" shall go to his brothers' and sisters' children, having before stated that *Mary Brand*, one of those children, should have an equal share with the rest. It was evidently his intention to give to *Mary Morris* the interest merely, and to give the capital, on her death, to his nephews and nieces. There are no words on which the Court could consider her entitled to the *corpus*.

The next question is, for what period it was given. The will contemplates three periods, with regard to *Mary Morris*; her minority, her remaining unmarried, and her death; and though he has expressed himself with ambiguity, it will be doing no violence to the words he has used, to hold that he meant to give her an interest during the whole of her life. He directs that she is to have the interest to maintain her, "as long as she lives single and no child;" and then proceeds to direct how the fund is to be disposed of at her death. "And when it shall please God to call her, that money to come to my brothers' and sisters' children." He undoubtedly has not in express words disposed of the interest during the interval between her marrying and having a child, and her death. When interest of a fund is given to a favoured object,  
 and

and the capital not given over till the death of that object, the Court must consider either that the testator's intention was, that the party on whose death the fund is given over, should be entitled for life to the interest, or that there is a partial intestacy. If in this case we are to proceed on the notion of an intestacy, we must suppose that the testator meant the property to devolve on persons who do not appear to have been objects of his bounty, although his intention was to dispose of the whole of his property. It cannot be supposed that he intended, that on the marriage of *Mary Morris*, the interest should be divided among all his next of kin, of whom his brother *Peter* was one, and to whom he had already bequeathed a legacy of 50*l.* The bequest over does not support the claim of the next of kin, for it is not a bequest to them, but to his nephews and nieces. To whom then is the intermediate interest to go? The only division he contemplates is one in which his niece *Mary Brand* was to participate; but she is not one of his next of kin. A construction which would give to *Peter*, who has an express legacy of 50*l.*, a share of the residue, and which would also let in all the other brothers and sisters, is one which the testator did not contemplate. The fund is not given over till the death of *Mary Morris*. He knew, that until that period it would produce interest, and that the interest must go to somebody. The interest is, in my opinion, given to *Mary Morris* for her life, by implication, but she has no claim to any part of the principal.

1818.  
BIRD  
v.  
HUNDON.

1818.  
 GARRARD  
 v.  
 GRINLING.

assignment is not proved. The agreement was read to the defendant, and he did not object to the non-insertion of a covenant to make five hundred coombs of malt. Under this contract, the defendant would, without any express stipulation, be entitled to all usual and proper covenants, including a covenant to use part of the premises for carrying on the trade of a maltster. The defendant therefore cannot be damnedified.

Mr. Bell, Mr. Wetherell, and Mr. Pepys, for the defendant. The plaintiff is seeking the performance of an agreement different from that which was really entered into by the parties, and of which he is therefore not entitled to the performance. And they referred to *The Marquis Townshend v. Stangroom* (a), *Woollam v. Hearn* (b), and *Higginson v. Clowes* (c). The covenant to make malt could not be inserted as an usual covenant. It is within the principle of *Church v. Brown* (d).

June 17.

*The MASTER of the ROLLS.*—After attentively reading the pleadings and the evidence, I am of opinion that the plaintiff has not made out a case which entitles him to a decree for the specific performance of the agreement which he states. A plaintiff who seeks to have a contract specifically performed, must satisfy the Court that he is entitled to a decree for the specific performance of the very agreement stated in his bill. He undertakes to prove that his written contract contains the true agreement between the parties; and when he insists on the performance of it, the question is, whether that written contract is agreeable to the actual contract; for it is undoubtedly competent to the defendant to resist the performance of it, by shewing, that in consequence either of mistake, of fraud, or of any other circumstance,

(a) 6 Ves. 328.

(b) 7 Ves. 211.

(c) 15 Ves. 516.

(d) *Id.* 258.

the written instrument does not correctly represent the actual agreement between the parties. It is clear that such is the nature of this case. Without imputing actual fraud, it is evident that this writing does not contain the real contract; for it was part of the actual agreement, that the plaintiff should be obliged to make annually on the premises five hundred coombs of malt. This is not disputed; on the contrary, the plaintiff's brother distinctly proves that such an agreement was made. This written contract details in many circumstances the covenants which would be contained in the lease. It provides for payment of the property tax, and contains various stipulations about repairs, and a valuation of certain articles on the premises; but it altogether omits the clause relative to the five hundred coombs of malt, which the witness who drew it clearly proves to have been a subject of discussion. It is contended on behalf of the plaintiff, that the omission is unimportant; and that as the agreement contemplated the execution of a future lease which would embrace proper covenants, it was not necessary that there should be a specification of all the covenants to be introduced into it. Undoubtedly, if this be an usual and proper covenant, no specification of it would be necessary; for it would be incidental to the agreement, and would be inserted in the lease without being specified in the agreement. I am of opinion, however, that it is not an usual and proper covenant; and it is clear that a covenant not answering that description cannot be engrafted on a written contract, specifying the future terms of an intended lease. The lease must be prepared according to the index and guide furnished by the express stipulation between the parties. Could the Master, on a reference to him to settle a lease pursuant to this agreement, have inserted in it a covenant to that effect? Clearly he could not. It is a particular and express, and not an usual and proper covenant. Without adverting to the alledged agreement respecting a covenant not to assign without licence, a species of covenant which  
has

1818.

GARRARD  
v.  
GRINLING.



1818.  
GARRARD  
v.  
GRINLING.

has been decided not to be usual, this is a covenant creating a very special obligation on the lessee, without which he would take the premises unfettered by any condition as to the purposes to which he should apply them, or the trade he should exercise upon them.

The contract was brought by the plaintiff for signature, not after a considerable interval of time, but immediately after the parties had been discussing the terms of the future covenants; yet it totally omits this which had been the subject of so much discussion between them. Without adverting to the question whether the witness *John Garrard* read the agreement correctly, it is clear that after the reading was finished, the defendant signed it under the supposition that it contained every thing necessary, or that if it did not, the proper covenants were to be introduced in conformity with the terms proposed on the preceding day. It was never his intention to relinquish the covenant about the 500 coombs of malt. Objections seem to have afterwards been made respecting a covenant against assigning, and on that subject the evidence is in some degree contradictory. The single question, however, is, whether, as the bill is filed, insisting that this written contract is the contract actually made, and which the plaintiff has always insisted should be performed, the Court can decree the performance of the written contract, when it is clear that it is not the true one between the parties, and when by so doing it could not impose those terms of caution and reserve on the lessee, without going into collateral matters not inserted in this agreement? It is enough to say, that on a bill for the specific performance of a contract, the Court can only decree performance of the actual contract between the parties. The real contract in this case would be composed partly of the written one stated in the bill, and partly of a supplemental one by parol. I am of opinion that the plaintiff has not made out his case; his bill must, therefore, be dismissed, but as there is some contrariety in the evidence, the dismissal must be without costs.

THE

1818.

## THE ATTORNEY-GENERAL v. LEPINE.

June 22.

**JOHN M'NABB** by his will dated the 8th of *May*, 1800, directed that one moiety of the residue of his estate should be "laid out in the public funds, or some such security, on purpose to bring one annuity, income, or interest for the benefit of a charity or school for the poor of the Parish of *Dollar* and Shire of *Clackmannan* where I was born, in *North Britain* or *Scotland*, that I give and bequeath to the Minister and Church of that parish for ever; say to the Minister and Church officers for the time being, and no other person shall have power to receive the annuity but the aforesaid officers for the time being of, or their agent appointed for the time by them." In *Trinity Term*, 1803, an information was filed by the Attorney-General at the relation of the Minister and Elders of the Parish of *Dollar*, and a bill by the relators, against the executors, praying an account of the testator's personal estate, that one moiety might be appropriated for answering the charitable bequest mentioned in the will, and either paid to the plaintiffs or to such persons as they should appoint, in order to be invested by them, or might be laid out under the direction of the Court for that purpose, and that the plaintiffs and their successors might be declared to be entitled to receive the interest and annual produce to arise from the same, for the benefit of a charity or school for the poor of the Parish of *Dollar*, according to the will, and might be enabled to receive the same accordingly. By a decree made on the hearing before Sir *W. Grant*, the usual accounts were directed, and by an order made on further directions on the 8th of *August*, 1805, it was ordered that the Master should approve of a proper scheme for carrying the charity into execution, that the relators and plaintiffs should be at liberty to lay proposals before

Where money was bequeathed to the minister and church of a parish in *Scotland*, for the benefit of a charity or school to be established there, the Lord Chancellor directed the money to be laid out in the name of the Accountant-General, and the dividends to be paid to the Minister and Church officers for the time being to be applied for the purposes of the charity, and reversed an order establishing a scheme for the charity, this Court not taking into its hands the administration of a charity in *Scotland*.

1818.  
  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 LEPINE.

before him for that purpose; and by another order dated the 22d of *February*, 1815, the Master's report, approving of a scheme, was confirmed, and it was ordered, that the scheme therein stated should be carried into execution by the relators and plaintiffs, and that they should be at liberty from time to time to apply to the Court for payment or advance out of certain stock and cash thereby directed to be carried over to the *Dollar School* account, of such sums as should be necessary to defray the expence of building the house and offices, and furnishing the same, and of inclosing the grounds with proper walls, mentioned in the Master's report; and also to defray the annual expence of the establishment in such report mentioned.

The relators appealed from the order of the 8th of *August*, 1805, as to the reference for approving of a proper scheme for carrying the charity into execution, and the permission to lay proposals before him for that purpose, and against the order of the 22d of *February*, 1815, so far as it confirmed that part of the report, and gave liberty to apply to this Court for payment of such sums of money as might be necessary to carry the scheme into execution; the relators alledging by their petition of appeal, that they were advised that the information and bill does not pray for any directions for carrying the charity into execution, and that this Court never proceeds to give directions for establishing a charity in *Scotland*, but directs the money to be paid over to the trustees, who must administer the same according to the law of *Scotland*, and under the direction of the Court of Session, in case it becomes necessary to resort to any Court for directions concerning the same.

Mr. Solicitor-General, Sir Samuel Romilly, and Mr. Bell, for the appellants.

The LORD CHANCELLOR reversed those parts of the orders which were complained of in the petition, observing, that

that this Court does not itself administer a charity which is to be administered in *Scotland*. That the gift was good, but that the sort of charity to be established would be a subject for the determination of the proper Court in that country.

1818.  
  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 LEFANE.

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The orders were reversed in the particulars above mentioned, and it was ordered, that certain stock forming a moiety of the testator's residuary estate should be sold, and the money invested in three *per cent.* consols, and that the dividends should be paid "from time to time to the defendant *A. Mylne*, and to the relators or such other person or persons who for the time being shall be the Minister and Church officers of the Parish of *Dollar*, to be by them applied for the benefit of a charity or school for the poor of the said Parish of *Dollar*, pursuant to the will of the testator."

[Reg. Lib. A. 1817, Fol. 1601.]

1818.

Feb. 5.  
July 29.

## CURZON v. Lord DE LA ZOUCH and others.

A defendant, after he was attached for want of answer, on the expiration of two orders for time "to plead, answer, or demur, not demurring alone," put in an answer and demurrer. The Court ordered the answer and demurrer to be taken off the file: but granted him a month's time to answer.

A MOTION was made on behalf of the plaintiffs, to take off the file a demurrer and answer which had been put in by *Rhoades*, one of the defendants, after he had obtained two orders for time to plead, answer, or demur, not demurring alone, and after he had been taken under an attachment for want of an answer on the expiration of the second order.

Mr. *Bell* and Mr. *Pepys* in support of the motion, referred to *Kenrick v. Clayton* (a), *Taylor v. Milner* (b), and *Mann v. King* (c), to shew that a defendant, having obtained an order for time to answer, cannot put in a demurrer and answer. They also referred to *Newton v. Dent* (d), *Dapont v. Ward* (e), and *Broughton v. Jones* (f). He is in contempt for want of an answer, as appears by the form of the writ of attachment, and by the indorsement upon it, "By the Court, for not answering." He cannot protect himself under the orders for time, for as they have expired, the case is in the same state as if they had not been made. The defendant must shew that there is a distinction in favor of a demurrer to a part only of the bill; but no such distinction appears in the books of practice.

Supposing the demurrer irregular, the question is, how is the irregularity to be remedied. The proper course is, that the demurrer and answer should both be taken off the file, for if the order is merely to expunge the demurrer, the record will be imperfect, the answer purporting to be to part only of the bill.

(a) 2 Bro. C. C. 214.  
(b) 10 Ves. 444.  
(c) 18 Ves. 297.

(d) 1 Dick. 234.  
(e) Ibid. 133.  
(f) 3 Madd. 42.

Sir

Sir Samuel Romilly and Mr. Wilbraham, *contrâ*. The present application is not supported by any decided case. It is regular for a defendant to demur to part of a bill, and to plead or answer to the rest. The only case having any resemblance to this is *Newton v. Dent*, which proves too much, for it is clear that the defendant might have pleaded; It is said that a defendant who is in contempt, cannot demur; but that proposition is not established. A defendant who is attached for want of an answer, is bound to answer, and cannot avoid answering by putting in a demurrer. If he demurs to the whole bill, he does not answer. But this does not apply to a case in which he answers all those parts which he is bound to answer, and demurs to the rest. Here it cannot be denied, that we might have demurred in effect, by submitting that we were not bound to answer. The Court would then have been called to determine on exceptions whether we were bound to answer. The plaintiffs therefore are not in any way prejudiced.

1818.  
CURZON  
v.  
Lord DE LA  
ZOUCH  
and others.

In the cases referred to, the orders were for time to answer merely, and the defendants were bound by the terms of the orders. In principle there is no difference between the case of a defendant who does not answer within the short period allowed by the rule of the Court, without the orders for time, and a defendant against whom an attachment issues for want of answer. If there was an irregularity, the plaintiffs have waived it by taking an office copy.

The LORD CHANCELLOR, during the argument, observed, that practice gives a construction in many instances to the term "answer." If there are some interrogatories to which the plaintiff is entitled to have an answer, and others which have a tendency to criminate the defendant, might he not, by his answer, submit that he could not be required to give an answer to those particular interrogatories? as in the case of  
a bill

1818.

CURZON

vs.  
 Lord DE LA  
 ZOUCH  
 and others.

July 29.

a bill in which every interrogatory, if answered, might subject the defendant to penalties.

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*The LORD CHANCELLOR.* The defendant having put in both a demurrer and an answer, there is an answer. According to some opinions, the course is to over-rule the demurrer, and let the answer stand. I do not think that is the proper mode of proceeding, for it admits that the demurrer is regular. I am of opinion that both the demurrer and answer must be taken off the file.

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“His Lordship doth order, that the said demurrer and answer be taken off the file: And it is ordered, that the defendant *Rhoades* do have a month's time to answer the plaintiffs' bill, and that he do pay to the plaintiffs the costs of this application, to be taxed, &c.”

[Reg. Lib. A. 1817, Fol. 1690.]

1818.

TURNER v. TURNER.

Jan.  
July 8.

A MOTION was made on behalf of the plaintiffs, that the Master might be directed to review his report; that the plaintiffs might be at liberty to take exceptions to it, and that in the mean time, proceedings under a subsequent decree on further directions, might be stayed. It appeared that the report was made in *December*, 1815, under a decree for an account of the personal estate of *Joshua Turner*, dated in *November*, 1801. In *May*, 1816, an order was made, absolutely confirming the report. The cause was, in *November*, 1816, heard by the Master of the Rolls for further directions. The motion was supported by affidavits, stating gross neglect on the part of the solicitor first employed: that he was removed in 1813, and that the solicitor who succeeded him, after having made objections to the draft of the report, which he did not communicate to the plaintiffs, went, in *September*, 1816, to *America*, and that on the 3d of *May*, 1817, an order was made, that a person in whose hands the papers in the cause had been left by the second solicitor, should, on taxation and payment of the costs, deliver them to the solicitor now employed by the plaintiffs: that the plaintiffs had not yet obtained possession of the papers: that they resided at a great distance from *London*: and that important exceptions were to be taken to the report, and that the interests of the plaintiffs would be lost by its remaining confirmed.

The Lord Chancellor cannot, on motion, order a Master to review his report after it has been absolutely confirmed, and followed by a decree of the Master of the Rolls on further directions, whilst the decree remains unreversed.

Sir *Samuel Romilly*, Mr. *Wetherell*, and Mr. *C. Harrison*, in support of the motion.

Mr. *Hart* and Mr. *Shadwell*, *contrà*.

The



1818.

TURNER  
v.  
TURNER.

July 8.

*The LORD CHANCELLOR.*—There is a difficulty in this case which I cannot get over. The Master has made a report under the original decree as to debts, &c. which report the plaintiffs say is wrong. That report has been confirmed, and the Master of the Rolls has made a decree according to it. How can I say that the report is wrong without setting aside that decree? And how can I set aside the decree on a motion to review the report? That there has been great negligence (although not on the part of any solicitor now employed) there can be no doubt: but I cannot keep suitors here for ever. It is not in the power of the Chancellor to order a report to be reviewed, which has been confirmed and followed by a decree of the Master of the Rolls, so long as the decree exists.

Motion refused.

July 18.

SMITH v. FROMONT.

A. the owner of a stage coach from Bristol to London, sold to B. the profits of it for a part of the road, B. agreeing to supply the coach with horses for that part of the road, and A. for the remainder. B.'s horses having been taken in execution and advertised for sale, A. provided his own horses to convey the coach along that part of the road comprised in B.'s agreement: and the Court refused a motion for an injunction to restrain him from so doing.

THE defendant, being the owner of a stage coach which travelled daily from *Bristol to London*, sold to the plaintiff all the benefit of the coach from *Hare Hatch to London*: and it was agreed that the horses to be used in that part of the road should be provided by the plaintiff, the defendant undertaking to furnish horses for the rest of the road himself. The defendant having afterwards, notwithstanding this arrangement, provided and used his own horses for conveying the coach along that part of the road which had been allotted to the plaintiff, a bill was filed, and a motion was now made on behalf of the plaintiff, for an injunction to restrain the defendant from using his own horses in conveying the coach from *Hare Hatch to London*. It appeared that the

plaintiff's

plaintiff's horses and other effects had been taken in execution and advertised to be sold by the sheriff, and that the defendant had provided horses for the conveyance of the coach from *Hare Hatch* to *London*, from an apprehension that it would be stopped, because the plaintiff, in consequence of the seizure of his horses, would not have the means of performing his part of the agreement.

1818.  
SMITH  
v.  
FROMONT.

Mr. Hart and Mr. Raithby in support of the motion.

Mr. Wetherell and Mr. Mascal, *contrâ*.

**The LORD CHANCELLOR.**—The only instance I remember of an application for an injunction respecting stage coaches, was a recent case (*a*), where a person having given up to another the business of a coach proprietor within certain limits, thought fit afterwards to resume it. This is a different case. The defendant here receives a sum of money for giving up part of the road; he is to provide the horses from *Bristol* to *Hare Hatch*, and the plaintiff from thence to *London*. The plaintiff gets into embarrassments, which produce an advertisement for the sale of his horses and harness by the sheriff. While the plaintiff's horses are in the possession of the sheriff, what is the situation of the defendant? He undertakes with persons at *Bristol* to carry them from thence to *London*. When he arrives at *Hare Hatch* he can proceed no further for want of horses. He would consequently be liable to an action by every one of the passengers

(*a*) WILLIAMS v. WILLIAMS.

The plaintiff and defendant had been partners in stage coaches, and by an agreement on the dissolution of their partnership, it was stipulated that the business, so far as it was carried on between *Newbury* and *London*, should belong to the plaintiff, and that the defendant should not carry on the business of a coach proprietor be-

tween *Newbury* and *London*. The defendant afterwards set up a stage coach, which began its journey at a place a few miles distant from *Newbury*, but travelled though *Newbury* to *London*. And on a bill filed and an affidavit, the Lord Chancellor, on the motion of Sir Samuel Romilly, granted an injunction to restrain the defendant from carrying on the business between *Newbury* and *London*.

1818.  
June 10.

1818.  
SMITH  
v.  
FROMONT.

whom he had previously agreed to convey to *London*. There is much difficulty in interposing by injunction. If I restrain the defendant from using his own horses, I must find some way of preventing *Smith* from not using his. I cannot restrain the defendant without insuring to him that he will find the plaintiff's horses ready at *Hare Hatch*, otherwise I should be enjoining the defendant against doing that, the not doing of which, may render him liable to an action by every person he has contracted to bring to *London*. It may be a question whether, if *Smith* can prove that he was always ready to furnish horses, he will not be entitled to the same profits as if he had actually provided them. It would probably be difficult for him to establish that fact. I have not the means of granting the injunction.

Motion refused.

# TABLE

OF

## CASES REPORTED.

---

VOL. II. PART I.

---

|                                                                                                                                                                                                        | Page |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| ATTORNEY-GENERAL v. Johnson. ( <i>Purpresture in the Thames</i> ). - - - - -                                                                                                                           | 85   |
| Brandon v. Brandon. ( <i>Construction of words "nearest and next of kin," in a deed—Set off.</i> ) - - - - -                                                                                           | 14   |
| Clarke v. Price. ( <i>Agreement respecting literary property—Injunction.</i> ) - - - - -                                                                                                               | 157  |
| Davis v. Duke of Marlborough. ( <i>Parliamentary grant for services performed—Expectant heir—Grant of annuity.</i> ) - - - - -                                                                         | 130  |
| Gardiner v. Fell. ( <i>Election—Devise of lands in India.</i> ) - - - - -                                                                                                                              | 32   |
| Hansard v. Kemeys. ( <i>Contribution by portioner towards incumbrances.</i> ) - - - - -                                                                                                                | 106  |
| Herring v. Dean and Chapter of St. Paul's. ( <i>Construction of exception of timber in a lease—Right of ecclesiastical corporation to cut timber, or grant such right to their lessee.</i> ) - - - - - | 1    |
| Jackson v. Sedgwick. ( <i>Practice—Motion for plaintiff to produce papers after answer, refused.</i> ) - - - - -                                                                                       | 167  |

Matthews

## TABLE OF CASES REPORTED.

|                                                                                                                                                                         | Page |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| Matthews v. Paul. ( <i>Construction of words "except an eldest son."</i> ) - - - -                                                                                      | 65   |
| Palmer v. Craufurd. ( <i>Under a gift of money to be laid out by trustees in purchasing an annuity for A. for his life, he is entitled to the money—Satisfaction.</i> ) | 79   |
| Simpson, <i>Ex parte</i> . ( <i>Bankrupt's privilege from arrest.</i> )                                                                                                 | 127  |
| Small, <i>Ex parte</i> . ( <i>Description of bankrupt in commission.</i> ) - - - -                                                                                      | 85   |
| Smith v. Stafford. ( <i>Where a canal runs through two Provinces, the will of a share-holder well proved in the Province where the canal-office is situated.</i> ) -    | 166  |
| Wales, Princess of, v. Earl of Liverpool. ( <i>Practice.</i> )                                                                                                          | 29   |
| Wilkinson v. Wilkinson. ( <i>Forfeiture under clause against alienation in a will.</i> ) - - -                                                                          | 47   |

# CASES

IN

## CHANCERY.

HERRING v. The DEAN and CHAPTER  
of ST. PAUL'S.

1819.  
Rolls.  
June 15, 17.

BY indenture of lease dated the 24th of July, 1813, between the defendants of the one part, and *Catharine Lowfield* of the other part, it was witnessed, that as well in

Lease for years by a Dean and Chapter, of "woods, groves, hedges, rows and springs, (describing them) and all the trees, woods, and underwoods growing, &c. or that hereafter shall grow, &c. within and upon the said woods, &c. except and reserved to the lessors upon every fall of the said woods, &c. twelve staddles or storers of oak, ash, elm, or hornbeam, that should be most likely for timber, for every acre of the said woods, &c." with a covenant by the lessee upon every fall of the woods, &c. to leave standing to the use of the lessors upon every acre to be felled, twelve staddles or storers of oak, ash, elm, or hornbeam, most fit or convenient to be timber according to the statute in such case made and provided: the staddles or storers to be appointed as follows; the lessee for every acre felled first to choose and appoint four of the best trees growing upon any acre so felled; then the lessee to take out to her own use four other of the next best trees upon any of the same acres; and then, thirdly, the lessors to choose and appoint eight other trees upon every of the said acres at their pleasure, for making up the twelve staddles or storers for every acre felled; with liberty of ingress, &c. for the lessors to cut and take the trees, staddles, or storers left standing: and a covenant by the lessee to leave the demised woods, &c. of certain specified growths at the end of the term. The lease was granted on the surrender of a former lease, and on payment of a fine amounting to one year and a quarter's rent, calculated on the value of the coppice and underwood and not of the timber. Held, that the lease did not comprise timber trees, but merely coppice and underwoods; and the lessors having during the term cut down on the demised premises a large quantity of timber, a bill filed against them by the lessee, for an account, was dismissed with costs.

A Dean and Chapter have not the power of cutting timber on their lands except for repairs of their property, and consequently cannot give any such right to their lessee.

And if they had possessed such a power, and the lease could be construed as transferring it to the lessee, it seems a Court of Equity would not carry such a transaction into effect.

VOL. II.

B

consideration


1819.

HERRING  
v.The DEAN and  
CHAPTER of  
ST. PAUL'S.

consideration that *Catharine Lowfield* had surrendered to the defendants a former lease from the defendants to her of the Woods, Groves, Hedge-rows, and Springs thereafter demised, dated the 5th of *August*, 1806, to the intent the said lease might be cancelled; and also in consideration of the yearly rent, covenants, and agreements after reserved and contained on the tenant's or lessee's part, and for other good and valuable causes and considerations, the defendants demised, granted, and to farm let unto *Catharine Lowfield*, All those their Woods, Groves, Hedge-rows, and Springs lying, standing, growing, or being within, of, or upon their Manor of *Heybridge*, in the County of *Essex*, thereafter severally named, that is to say; one Wood called *Bromley Wood*, with two little Grovets thereunto adjoining; one Wood called *Hawk's Wood*, with one Grove or Hedge-row adjoining at and to the East end thereof [describing it]; one little Grove at the West end of the said Grove or Hedge-row; two Hedge-rows or Groves in the *Upper Heathfield*, [describing them] with twelve rods of the *South Stile* in the Common Footpath that leadeth through the same field to the Heath commonly called *Tiphee Heath*; and all the trees, woods, and underwoods growing and being, or that thereafter should grow or be within and upon the said Woods, Groves, Hedge-rows, and Springs above-named, and every of them, all which said premises theretofore were in the tenure or occupation of *Edmund Percival*, Esq. or of his assigns or under-tenants: Except and always reserved unto the defendants, their successors and assigns, upon every fall of the said Woods, Groves, Hedge-rows, Springs, or any part or parcel thereof, Twelve Staddles or Storers of oak, ash, elm, or hornbeam, that should be most likely for timber for every acre of the said Woods, Groves, Hedge-rows, and Springs thereafter, during the term of years under-written: To hold the said Woods, Groves, Hedge-rows, and Springs, and all the before mentioned demised premises, with the appurtenances (except before excepted) unto *Catharine Lowfield*, her executors, &c.

from

from the Feast Day of the Nativity of *St. John the Baptist* then last, for the term of twenty-one years, at the yearly rent of 50s. The lease contained a covenant by the lessee, that she, her executors, &c. would, at and upon any fall of the said Woods, Groves, Hedge-rows, and Springs, or of any part or parcel thereof, during the said term, leave standing in and upon the premises, to the use of the defendants and their successors, in and upon every acre so to be by him, her, or them felled, Twelve good and sufficient Staddles and Storers of oak, ash, elm, or hornbeam, most fit or convenient to be timber, according to the Statute in such case made and provided; the same Staddles or Storers to be appointed out in the manner and form following: the defendants, their successors or assigns should, for every acre felled as aforesaid, first choose and appoint out four of the best trees that should happen to grow in and upon any acre so felled, and then the said *Catharine Lowfield*, her executors, &c. should accept and take out to her and their own proper use four other of the next best trees that should grow upon every of the same acres; and then, thirdly, the defendants, their successors and assigns, should choose and appoint eight other trees in and upon every of the said acres, at their will and pleasure, for the making up of the said Twelve Staddles or Storers for every acre so to be felled as aforesaid: and that it should be lawful for the defendants, their successors and assigns, the said Trees, Staddles, or Storers, at any time after they should be so appointed out and left standing for their use as aforesaid, to have free ingress and regress unto and from the said Woods, Groves, Hedge-rows, and Springs at their pleasure to fell, cut down, hew, square, and carry away, by all and every such way and ways as *Catharine Lowfield*, her executors, &c. should use to carry her and their own wood and trees out of and from the said Woods, Groves, Hedge-rows, and Springs, or any of them. There was also a covenant by the lessee, that she, her executors, &c. would not convert the said Woods, Groves, Hedge-rows, and Springs, or any of them, to pasture, meadow or arable ground; but keep the

1819.  
  
 HERRING  
 v.  
 The DEAN and  
 CHAPTER of  
 ST. PAUL'S.



1819. same as wood-grounds during all the said term of twenty-one years, and at the end thereof would deliver up the same to the defendants, their successors or assigns, of the several growths following: *Bromley Wood*, of two years' growth; *Hawk's Wood*, of six years' growth; the Hedge-rows adjoining to *Hawk's Wood*, and the Grovet at the West end thereof at five years' growth; and the Woods, Groves, and Hedge-rows in *Heathfield*, of one year's growth.

HERRING  
v.  
The DEAN and  
CHAPTER of  
ST. PAUL'S.

The lease was granted to *Catharine Lowfield* as a trustee for the plaintiff *Oliver Herring*. In May 1814, a great number of timber trees growing on the property comprised in the lease, of the value of 1100*l.* and upwards, were, by the order of the defendants, cut down by their agents, and carried away and sold; whereupon the present bill was filed by the plaintiff *Mr. Herring*, and *Mrs. Lowfield* his trustee, praying an account of the timber trees cut, an account and payment of the monies for which they had been sold, and an injunction against cutting down any other timber trees growing on the demised premises; insisting, that according to the true construction of the lease, the plaintiff *Catharine Lowfield* was entitled to cut down and dispose of the timber trees, and receive the produce in trust for the other plaintiff *Herring*.

It appeared that the Dean and Chapter had, for a great number of years, been in the habit of granting leases of the property in question for terms of twenty-one years, which leases, at the end of every seven years, were surrendered, and renewed leases granted on payment of a fine. All the former leases appeared to have been in nearly the same terms as the lease of 1813. On the granting of that lease a fine was paid amounting to 89*l.* 3*s.* 9*d.* being one year and a quarter's value of the property comprised in it, which was previously ascertained by a valuation made by the surveyor of the defendants. In making his calculation, the surveyor valued the property as underwood and coppice alone, and made no valuation of the timber trees.

Mr.

*Mr. Hart and Mr. Shadwell* for the plaintiffs. The property comprised in this lease consists entirely of woods; the power of cutting timber therefore is incidental to the grant which would otherwise be in a great measure nugatory. The intention of the parties that such a right should be included, is further shewn by the exception of twelve Staddles or Storers, and by the covenant in the subsequent part of the lease to leave those trees upon every fall. A lease of woods cannot mean of a part of the woods merely. The word "springs" alone would have been sufficient to comprise underwood and coppice, if the parties had intended to confine the operation of the lease to woods of that description. The additional words "woods and groves" shew that they did not mean so to confine it. It is impossible therefore, without doing violence to the language of the deed, to restrain its operation to coppice and underwood. There is no law to restrain the Dean and Chapter from cutting down timber. The constant practice is for Ecclesiastical Corporations to cut down the timber growing on their estates: and if they may exercise this right themselves, they may impart it to their lessees. If the exception had not been introduced, the lessee would have had a right to cut down the whole.

*Mr. Horne and Mr. Sugden* for the defendants. It appears on the face of this lease that it was granted on the surrender of one previously existing, and there have been for many years successive leases in the same form and with the same exception as the present. The whole growth of timber in these woods has been the consequence of the exception and covenants which have been constantly introduced into the preceding leases. The intention was, that the lessee should not cut any of the timber which had arisen from the Storers reserved out of the operation of the former leases. Nothing was intended to be included in this lease which had not been included in the former. The Staddles or Storers are trees which might be cut down without the party being  
guilty

1819.  
HERRING  
v  
The DEAN and  
CHAPTER of  
ST. PAUL'S.

1819.

HERRING  
v.The DEAN and  
CHAPTER of  
ST. PAUL'S.

guilty of waste, and which if they were suffered to remain would become timber. Timber trees were not the subject of the exception. The argument on the other side is fallacious in supposing the exception to relate to timber trees. But unless the exception had been introduced the lessee might have cut down all those trees which would hereafter become timber. The exception and covenant were introduced into the present, as they had been introduced into all the former leases, for the purpose of effectuating the provisions of the Statute "for the preservation of woods (a)," which directs, "that in and upon all coppice woods, or underwoods, which should be felled at twenty-four years standing or under, there should be left standing and unfelled for every acre of wood that should be felled within the coppice, twelve Standils or Storers of oak, and if there should be not so many Standils or Storers of oak there, then there should be left so many of other kind, viz. of Elm, Ash, Asp, or Beech as should make up the number of twelve Standils or Storers likely to prove timber trees; the same Standils or Storers to be of such as had been left there standing at any felling of the coppice or underwoods in times past; and if there were none standing which were left at the last felling, then the Standils or Storers there to be left, should be left at the then next felling of the coppice woods or underwoods." The exception and covenant would be nugatory if a subsequent lessee was to have the unlimited right of cutting down all those trees which had been preserved by means of the exceptions in the previous leases. The intention of the parties was, that no timber should be cut which had arisen from the Storers which had been preserved under the successive exceptions and covenants in the leases. It is impossible to support this deed as a grant of the trees, supposing them not to pass under it as a demise. If the trees be demised as a subject of property, can it be contended that the lessee has the

(a) 35 H. 8. cap. 17. sect. 1. made perpetual by 13 Eliz. c. 25.

right to cut and take them away? It might with as much reason be said, that by virtue of a lease of land he might carry away the soil. In a demise of woods, the periodical cuttings of underwood are exactly the same as the reaping of corn or the mowing of grass is in a demise of land. In a case in *Dyer* (a), a man "demised, granted, and to farm let" a farm and divers closes, "together with all timber wood, underwood, and hedge-rows thereunto appertaining, except all great oaks in" a particular close; and the question was whether the lessee might cut down and sell the timber trees not excepted. In that case the circumstances were more favourable to the lessee than they are in the present, for there was an express grant of all timber trees, and an exception of timber trees in a certain close, and yet by the opinion of three Judges against one, it was held that the lessee could not cut those timber trees which were not excepted. And in 1 *Roll. Rep.* 100. a case is stated, in which a man "demised, let, and granted" land and trees, for years, and it was held, that because the word "grant" could not be severed from the word "let," the trees were only leased. It would be an inconvenient construction if the words could be separated, for then part would pass for the term, and part not for the term. In the present case, whatever passed by the demise or grant, passed by the Habendum, and merely during the term. In the Year Book 12 *Ed.* 4. *pl.* 20. a case is put by *Brian*, of a lease at will of a wood in which there were none but great trees, and he asks whether the lessee could cut them; to which *Choke* answers in the negative, and adds that the lessee should not have any profit besides the grain, &c.

There is another decisive objection to this bill. The defendants cannot by law cut timber, except for the purpose of repairs. This seems to have been clearly admitted in the late case of *Wither v. The Dean and Chapter of Win-*

1819.  
HERRING  
v.  
The DEAN and  
CHAPTER of  
ST. PAUL'S.

(a) *Dyer* 374 b. *pl.* 18.

1819.  
  
 HERRING  
 v.  
 The DEAN and  
 CHAPTER of  
 ST. PAUL'S

*chester* (a). They could not therefore grant any such power to their lessee. If the plaintiffs are right in their construction of this lease, it is void by the statute (b), as being made unimpeachable for waste (c), and the plaintiffs consequently can have no right to file a bill (d).

*The MASTER of the ROLLS.*—This is a bill calling on the Dean and Chapter of *St. Paul's* to account for timber which they have cut down since the execution of a lease granted by them to the plaintiff *Mrs. Lowfield*, as a trustee for the other plaintiff *Mr. Herring*, insisting that the plaintiff *Mr. Herring* is entitled to the whole of the timber, and to have the benefit of the produce for his own use, and praying an account of the sale of the trees which have been sold, and an injunction to restrain the defendants from cutting any in future. The plaintiffs contend, that according to the true construction of the lease, the plaintiff *Mrs. Lowfield* is lawfully entitled to cut down and dispose of timber trees for the use of the other plaintiff. This proposition is denied by the defendants. It is necessary for the plaintiffs to assume that the Dean and Chapter possess the right of cutting down for their own use all trees without regard to quality, and that by the lease they have transferred that right to the plaintiff. The facts of the case are not controverted. It is not dis-

(a) 3 *Meriv.* 421.

(b) 13 *Eliz. c.* 10.

(c) By the 33 *H. 8. c.* 28. leases by persons having an estate of inheritance in right of their churches are made good against the lessors and their successors; but there is a proviso, that the act shall not extend to any lease to be made without impeachment of waste. But ecclesiastical corporations aggregate, not being within the act, possessed by the common law an unlimited power of alienation till the 13 *Eliz. c.* 10. which avoids all leases, &c. by any Dean and Chapter, &c. other than for twenty-one

years or three lives. This act does not in express terms restrain them from granting leases dispensable of waste, but it has been held that they are so restrained by the equity of the statute. *Co. Litt.* 44 b. 45 a. *The Dean and Chapter of Worcester's Case*, 6 *Rep.* 57 a.

(d) According to the authorities collected in *Bac. Abr. Leases*, H. (1), the lease could not be avoided during the life and continuance of the Dean who made it. But the case of *Lloyd v. Gregory*, stated in note 1 to *Hargr. Co. Litt.* 43 a. and note 4 to 45 a. from Sir *Matthew Hale's MSS.* seems *contra*.

puted

puted that the present lease is drawn in conformity with those which preceded it. But it is contended by the plaintiffs, that they are in justice entitled to an account, having fairly purchased the timber trees, for although the annual reserved rent is but fifty shillings, yet it is said that a large fine was paid for granting the lease, and on the faith that the plaintiffs should be entitled to that which they now claim. The defendants admit the fact of their having in the year 1814, cut timber to the amount of nearly twelve hundred pounds. But they say that the fine paid on granting the present lease was only one year and a quarter's rent on the coppices and underwoods; that it was not calculated on the value of the great trees, and that as to the antecedent leases, the usage has been that the Dean and Chapter have always exercised the right of cutting down the great trees, and their lessees the right of cutting the underwoods and coppices alone. The questions to be considered are three:—First, whether the Dean and Chapter, prior to the execution of the lease, possessed the power of cutting all the timber on the demised premises, and of converting it absolutely to their own use. Secondly, supposing them to have possessed that power, whether they intended to transfer, and did actually transfer it to the plaintiff *Mrs. Lowfield* by the lease. And Thirdly, supposing both the former questions to be decided in the affirmative, whether it is such a transaction as will be carried into effect by a Court of Equity.

With regard to the first question, it is to be remembered that this is property belonging to an Ecclesiastical Corporation, and after the cases of *Jefferson v. The Bishop of Durham* (a), and *Wither v. The Dean and Chapter of Winchester* (b), no doubt can be entertained respecting the nature of the right to timber growing on the land of an Ecclesiastical body. Whatever doubt may exist respecting the Court which

1819.

HERRING

v.  
The DEAN and  
CHAPTER of  
ST. PAUL'S.

(a) 1 Bos. &amp; Pull. 105.

(b) 3 Meriv. 421.

has

1819.

HERRING

v.

The DEAN and  
CHAPTER of  
St. PAUL's:

has jurisdiction to interfere in case of an abuse of the power, (and which formed the principal subject of discussion in *Jefferson v. The Bishop of Durham*), it is clear that it is a power which is to be exercised for the benefit of the Church. The opinion of the Lord Chancellor in *Wither v. The Dean and Chapter of Winchester*, was, that the Dean and Chapter had power to cut the timber and apply the produce in repairs, or to sell it and apply the produce in repairing the fabric of the Church and the buildings belonging to it. So far only have they a power over the timber; but they have no authority to cut it down and divide the produce among themselves. In the present case it is contended that the defendants have the power, and that they have transferred it to their lessee, who is by that means entitled to cut down the timber for his own use, and without any regard to the application of the produce. It is unnecessary at the present day to discuss the question respecting the right of the defendants. The nature and extent of their right are clear. An exercise of that which is assumed by the plaintiffs to be the right would be an ecclesiastical offence, and might be a cause of deprivation (a). The only question in the cases has been, whether the power of controuling an abuse of the right is vested in the Ecclesiastical or in the Temporal Courts. It was observed in *Lisford's Case* (b), that the treatise intituled "*Ne Rectores proutenant arbores in Cameterio*," is declaratory of the common law.

But if it were clear that the defendants intended to convey, and did actually convey to their lessee the power of cutting down all the timber on the estate, it would be a question whether such a transaction should be carried into execution by a Court of Equity. The Court would expect that the in-

(a) "If a Bishop or Archdeacon abates and fells all the wood that he has, he shall be deposed as a

dilapidator of his house." 11 Rep. 49 b.

(b) 11 Rep. 49 b.

tention to enter into such a contract should be clear and explicit. The amount of the fine paid on granting the existing lease, totally excludes the supposition that it could be so intended in the present case. It could never be meant that the lessee should be enabled immediately to appropriate a sum of 1100*l.* or 1200*l.* It is extremely unlikely that the defendants, who are known to have an estimate made of the value, and to take as a fine a year and a quarter's rent, could be supposed to have intended to transfer to the plaintiffs such a right as that which is now contended for; nor has any usage been proved which could support such a claim. Independent, however, of these considerations, let us look at the lease itself. The intention appears to have been, that the present lessee should have every thing which was in the lease of *Percival*, the former lessee. Whenever woods are comprised in a lease, the first question is, what is the nature of the wood. It may be a wood consisting of great trees only, or partly of great trees and partly of coppice wood, or of coppice wood only. As between an ordinary tenant and his lessor, if it consisted of great trees only, the tenant would not derive the property of the trees but only the use of them. In *Bro. Abr. Waste*, pl. 126. it is said, that "if a man lease twenty acres of wood at will, the lessee may cut the trees seasonably, but not the great trees." It is also clear, that if there be a demise of land on which trees are growing, or of a farm, including the trees, though there be no express exception, yet the law makes an exception of the trees, and the lessee cannot cut them down, because he has but a limited interest. The temporary use alone is transferred to him. This rule is distinctly stated in *Liford's Case* (a), where the subject was very fully discussed, and it was resolved, "that when no exception is in the lease, of the trees, the lessee has a particular interest in the tree, and the inheritance of the tree is in the lessor." And in the same case, a former case in *Dyer* (b),

1819.  
HERRING  
v.  
The DEAN and  
CHAPTER of  
ST. PAUL'S.

(a) 11 *Rep.* 46.

(b) *Dyer*, 374 b. pl. 18.



1819.

HERRING


v.

The DUKAN and  
CHAPTER of  
ST. PAUL'S.

was referred to, (which on this occasion has been cited by Mr. Sugden), in which it was held, by three judges against one, that under a demise of a farm and divers closes, "with all timberwood, underwood, and hedge-rows thereunto appertaining, except all great oaks growing in a particular close, *habendum* the farm and closes with their appurtenances," to the lessee, he could not cut down and sell the timber trees not excepted. The same case is referred to as an authority in the *Touchstone* (a). These are the general principles applicable to cases between an individual lessor and his lessee; and *a fortiori* they apply to the case of an Ecclesiastical Corporation whose right is qualified. The proposition that the lessee is in the present case to have the absolute property of the trees, militates not only against the principle that the defendants as an Ecclesiastical Body had not the absolute property in them, but also against the true construction of the terms of the lease. Where is there to be found any thing to make out this extraordinary proposition? The words of the lease are general. It is totally silent on the subject of cutting down trees by the lessee. If there be an appearance of the grant of any such right in some parts of the lease, it is to be collected merely by inference. The words are those of demise for twenty-one years, and not of grant. Whence then arises the right to cut down any thing? Clearly not from any express words in the instrument. The lessee is to have the use and the profits during the term. It must depend on the nature of the woods, whether he is to have a right to cut down any thing. How then does he derive it? Because it appears to be a lease of coppice and underwood by the intrinsic evidence of the lease itself. It was not necessary to give by express words the power of cutting coppice and underwood; for the right of cutting them is part of the profits which periodically arise, and during the term the lessee has the right of cutting them as

(a) *Touchst.* 95.

much as he would have the right of reaping the corn or taking the grass under a demise of arable land or of meadow. But this does not extend to the right of cutting great trees. All the right to cut, being a right merely by inference, is derived from the nature of the property. The language of the lease warrants this view of the case. The first words are general, but the exception is of "twelve Staddles or Storers of oak, ash, elm, or hornbeam, *that shall be most likely for timber, for every acre of the said woods,*" &c. The excepted articles are clearly such as are not yet actually become timber. Staddles or Standells (a) are those which are to stand for timber, and they are termed Storers, because by their means a store of timber is to be preserved. The four best trees are first to be selected by the lessors; four others are then to be taken by the lessee, and eight others are then to be chosen by the lessors for making up the twelve, and ingress and regress are given to the lessors to cut down and carry away the Staddles or Storers left standing as before expressed. The liberty to the lessee of cutting down is only given by inference, whereas that which is reserved to the lessors is given by express words, and is accompanied with full power of ingress and regress. It has been properly observed, that this exception had reference to the statute 35 H. 8. That is another circumstance, tending to shew that the lease was of coppice wood. When in this lease we find a reservation agreeing with the terms of the first section of that statute, it strongly confirms the supposition that the subject of the demise was the same as that to which that section of the statute relates, namely, coppice woods. The covenant on the part of the lessee to leave one of the woods of the growth of two years, another of the growth of six, another of five, and others of one, is inapplicable to great timber, and is only intelligible on the supposition that

1819.  
  
 HERRING  
 v.  
 The DEAN and  
 CHAPTER of  
 ST. PAUL'S.

(a) According to *Cowell's Interpreter*, a *Standell* is "a young store oak tree, which may in time make timber, twelve such are to

"be left standing in every acre of  
 "wood at the felling thereof.  
 "35 H. 8. 17, and 13 Eliz. c. 25."

coppice

1819.

HERRING

v.

The DEAN and  
CHAPTER of  
ST. PAUL'S.

coppice woods were the subject of the lease. According to this interpretation, the instrument is no violation of the duty of the Dean and Chapter, for they have given to their lessee the right of cutting that which ought to be cut. This construction agrees with the act of parliament and the constant usage, and it effectuates the true contract between the parties, by giving to the lessee that for which alone she has paid a consideration. This appears to me the plain meaning of the lease. If construed otherwise it would be a direct authority to the lessee to commit waste on ecclesiastical property, and would not be a fit subject for a Court of Equity to carry into execution. In every view therefore of this case, and considering, first, that the Dean and Chapter have not an absolute right to cut the timber; secondly, that if they had, they have not transferred it to the plaintiffs; and thirdly, that it would not be a transaction to be carried into effect by a Court of Equity, I am of opinion that this bill must be dismissed, with costs.

ROLLS.

June 17, 21.

July 14.

BRANDON v. BRANDON.

By a marriage settlement, monies belonging to the wife were vested in trustees, in trust to assign 1000*l.* stock to

the husband: and to invest the remainder in government securities; and in case the husband should survive the wife, and there should be no issue of the marriage, to transfer one moiety of the trust stock to the husband if he should survive his wife, and to transfer the other moiety to the nearest and next of kin of the wife in equal shares amongst them. On the death of the wife without issue, in the husband's life-time, held, that a brother who survived her, was solely entitled to this moiety, in exclusion of the children of two sisters who died in her life-time.

By the same settlement the husband covenanted that if his wife should die in his life-time without having issue to survive her thirty days, he would within three months after her decease transfer 500*l.* bank annuities to the trustees "for the sole use and property of the nearest and next of kin" of the wife. The husband having become bankrupt in his wife's life-time, held, 1st. That his moiety of the trust stock could not be retained or set off in satisfaction of his covenant; and 2dly, That the covenant did not create a debt proveable under the commission.

consolidated

consolidated bank annuities for her marriage portion, to *Abraham Brandon*, and to invest the remainder in government securities: and in case there should be no issue of the marriage, in trust to transfer one moiety of the trust stock to *Abraham Brandon*, in the event of his surviving his intended wife, and to transfer the other moiety "unto the nearest and "next of kin of her the said *Abigail Brandon*, in equal "shares amongst them." The deed contained a covenant by *Abraham Brandon*, that in case *Abigail* should die after the marriage, in his life-time, without having issue to survive her thirty days, *Abraham Brandon* should within three months after her decease, transfer and pay over the sum of 500*l.* three per cent. consolidated bank annuities to the said trustees, "for the sole use and property of the nearest and next of kin of the said *Abigail Brandon*."

1819.  
BRANDON  
v.  
BRANDON:

The marriage took effect, and the 1000*l.* stock was transferred to *Abraham Brandon*. There was no issue of the marriage, and *Abigail* died in the year 1815, in her husband's life-time. She had two sisters and one brother. The brother survived her; but both the sisters died in her life time, leaving children who survived *Abigail Brandon*. *Abraham Brandon* in May 1793, became bankrupt, and the usual assignment of his property was made by the commissioners to the assignees.

Upon a bill filed by *Jacob De Fonseca Brandon*, the only brother of *Abigail Brandon*, against the trustees of the settlement, the children of the deceased sisters of *Abigail Brandon*, together with *Abraham Brandon* and his assignees, the questions were, first, whether the plaintiff alone was entitled to the property limited to the nearest and next of kin of *Abigail Brandon* by the settlement, or whether it was to go according to the Statute of Distributions (a), in which case the children of the deceased sisters would be entitled

(a) 22 § 23 Car. 2. c. 10.

1819.

BRANDON  
v.  
BRANDON.

to participate with him. And secondly, whether the trustees of the settlement were entitled either to retain out of *Abraham Brandon's* moiety of the trust funds, 500*l.* three *per cent.* bank annuities, in satisfaction of his covenant contained in the settlement, or to prove it as a debt under the commission against him.

It appeared that all the parties to the settlement were of the Jewish Religion: and the plaintiff examined as a witness the Chief Rabbi of the Spanish and Portuguese Synagogue in *London*, the substance of whose evidence was, that by the law subsisting among persons professing the Jewish Religion, the surviving brother of a deceased person would be solely entitled to his personal estate, in exclusion of the children of his deceased sisters, under a gift to his next of kin (a).

Sir *Arthur Piggott* and Mr. *E. V. Sidebottom* for the plaintiff, contended, as to the first point, that under the words "nearest and next of kin," the plaintiff, as the surviving brother of *Abigail Brandon*, was entitled in exclusion of the children of her deceased sisters. There is no such uncertainty in the term "Next of Kin," as to render it necessary for the Court to resort to the Statute of Distributions (b) as the rule of division; and it is only where the terms of a gift have been so indefinite that the bequest would otherwise be void for uncertainty, that the Court, in order to prevent that consequence, has taken the Statute as a guide; as in *Thomas v. Hole* (c), where the gift was "to the relations of *Elizabeth Hole*;" in *Whithorne v. Harris* (d), where it was "to all and every person and persons who are near relations to me," and in *Green v. Howard* (e), where the bequest was to "relations."

(a) Though this evidence was read at the hearing and noticed in the argument, it was not adverted to in the judgment, the Court deciding entirely on the construction of the deed.

(b) 22 & 23 Car. 2. c. 10.

(c) *Forrester*, 251.

(d) 2 Ves. 547.

(e) 1 Bro. C. C. 31.

There are many other cases of the same kind (a), but with the single exception of *Phillips v. Garth* (b), which will be afterwards observed upon, there is no instance in which, under a gift to next of kin, recourse has been had to the statute. The term "next of kin" was well known to the law long before the Statute of Distributions. It occurs in the 21 H. 8. c. 5, by which the Ordinary is directed to grant administration to the widow or the next of kin, and it was never held that under that statute the child of a deceased brother could claim a grant of administration when there was a surviving brother. If there be no brother, the administration is to be granted to the grandfather, and then to the nephews and nieces (c). If this case had happened before the Statute of Distributions, it is clear that the surviving next of kin would have been held entitled, in exclusion of representatives of the deceased's next of kin; and though that statute introduced the title by representation, it has not altered the meaning of the words "next of kin." It is impossible to say that a person in a more remote degree is next of kin. The only case in which under a gift to next of kin, the children of a deceased brother and sister have been held to be entitled to share with surviving brothers, is *Phillips v. Garth* (d), and in that case it was stated by the Attorney-General, (Sir Archibald Macdonald) who argued for the surviving brothers, and in opposition to the claim of the nephews and nieces, (and was not denied by the counsel on the other side,) that no case then existed where next of kin had been extended to relations, though the word "relations" had been bounded by the determinations to signify next of kin. But Mr. Justice Buller, sitting for Lord Thurlow, held, that the brothers and the nephews and nieces were entitled in

1819.  
BRANDON  
v.  
BRANDON.

(a) They are collected in *Roper on Legacies*, vol. i. p. 115. [2d ed.]

(b) 3 Bro. C. C. 64.

(c) For the order in which next of kin are entitled to a grant of

letters of administration under this statute, see *Vin. Abr. tit. Executors*, K. 3; and *Toller's Law of Executors*, p. 90. 2d edit.

(d) 3 Bro. C. C. 64.

1819.

BRANDON  
v.  
BRANDON.

equal shares *per capita*. The learned judge appears to have admitted that the natural sense of the words "next of kin" was against the claim of the nephews and nieces; but that since the statute 1 Jac. 2. c. 17. the words have had a particular sense. That statute provides, that no administrator shall be cited according to the Statute of Distributions, to account for the intestate's personal estate, unless at the instance of some person on behalf of a minor, or having a demand as a creditor "or next of kin." But there can be no doubt that the intestate's widow is included in the exception, and yet it has been held in *Garrick v. Lord Camden* (a), and other cases, that she is not one of her husband's next of kin, and cannot take under that description (b). The statute of Jac. 2. does not in truth introduce any new meaning of the term "next of kin." It was merely intended to confine the remedies against the administrator to those persons entitled to distribution under the 22 & 23 Car. 2. The case of *Phillips v. Garth* is not reconcilable with *Marsh v. Marsh* (c), where Lord Loughborough, Mr. Justice Ashhurst, and Mr. Baron Hotham, Lords Commissioners, held, that under a gift to the testator's "nearest relations, and "the nearest relations of such nearest relations," a half sister of the testator was entitled in preference to the children of the deceased's half brother, and to the testator's widow. And in *Smith v. Campbell* (d), where the testator directed his property to be equally distributed "amongst his nearest surviving "relations in his native country, Ireland," Sir William Grant held, that brothers and sisters of the testator, living at his death, were entitled in exclusion of the children of a brother who died in his life-time: and his Honour said, that if the testator had used the words "next of kin" instead of "nearest surviving relations," yet if there had been nothing in the will to shew that he meant next of kin, according to

(a) 14 Ves. 372.

(b) See also *Bailey v. Wright*, 18 Ves. 49, and *ante*, Vol. I. p. 15.

(c) 1 Bro. C. C. 293.

(d) *Cooper's C. C.* 375.

the Statute of Distributions, he should have thought the brothers and sisters would have been exclusively entitled. The last case is a very strong authority for the plaintiff. None of the reasons which have been given in former cases for resorting to the Statute of Distributions, will apply to the present case, for the term "nearest and next of kin" is a term of definite import. If the parties had intended a distribution according to the statute, they would not have directed it to be made in equal shares. It is also worthy of remark, that the contracting parties in this case were Jews, and it may reasonably be supposed to have been their intention to use the words "next of kin" in the sense which appears to be generally applied to them in the *Jewish Law*, by which all title by representation, and all devolution to females appear to be excluded.

1819.

BRANDON  
v.  
BRANDON.

As to the second question, it was contended, that the share of *Abraham Brandon* ought to be applied in satisfaction of his covenant, or set off against the demand which the covenant created. If he had not become bankrupt he would not have been suffered to come into this Court for the purpose of enforcing any demand under this instrument, until he had performed all the engagements into which he had entered by the same instrument. Under the settlement he was a purchaser of his wife's fortune: his wife was the vendor, and part of the price consisted of his covenant for the transfer of 500*l.* bank annuities, in the event which has now happened. The persons now claiming under the wife are therefore entitled to the same lien for the consideration of the purchase, as the ordinary equity of the Court gives to a vendor on a common contract for sale; and the assignees of the bankrupt take his property subject to all the equities affecting it. But if the principle of lien does not apply to this case, the trustees are entitled under the doctrine of set off or mutual credit, to set off for the benefit of the plaintiff, the bankrupt's moiety of the settled property against his covenant. The circumstance



1819.  
  
 BRANDON  
 v.  
 BRANDON.

of the 500*l.* stock not being actually transferable at the time of the bankruptcy, cannot make any difference. And on this part of the case they cited *Jeffs v. Wood* (a), *Atkinson v. Elliott* (b), and *Ex parte Boyle* (c).

Mr. *Wetherell* and Mr. *Wyatt*, for the defendants, the nephews and nieces, contended, that there was no substantial distinction between the words "next of kin," and the words "relations" or "nearest relations," in which cases the Statute of Distributions had been resorted to. The words are to be understood in the sense of civil, as distinguished from natural next of kin. And they cited *Thomas v. Hole* (d), *Whithorne v. Harris* (e), and *Phillips v. Garth* (f). This is not a case in which the rules of any foreign law can be resorted to for the purpose of shewing the sense in which the words are to be understood. There can be no *conflictus legum* here, for all the contracting parties were resident here, and the subject-matter of the contract is locally situated in this country. The *Lex Domicilii* and the *Lex loci rei sitæ* are not opposed to each other; and no authority or principle has been stated to shew that the Court can explain the words of this settlement, by referring to any other law than the law of this country.

Mr. *Heuld* and Mr. *Teed*, for the assignees of *Abraham Brandon*, contended, that the trustees of the settlement could neither retain his moiety towards satisfaction of his covenant, nor prove the 500*l.* bank annuities as a debt under the commission. It was merely a contingent debt, which could not have been recovered against *Abraham Brandon* if he had not become bankrupt. The stock was only to be transferred three months after his wife's death, in case he

(a) 2 P. Wms. 128.

(b) 7 T. R. 378.

(c) Co. Bankrupt Law, 7th edit.  
 p. 542.

(d) Forrester, 251.

(e) 2 Ves. 527.

(f) 3 Bro. C. C. 64.

survived her, and there should be no issue of the marriage. In *Ex parte Boyle* there was no contingency. The notes, though payable at a future day, were payable at all events. In the present case it was impossible at the time of the bankruptcy, to say that any thing might have become due.

1819.  
BRANDON  
v.  
BRANDON.

*The MASTER of the ROLLS.* The question which arises between the persons entitled under the settlement and the assignees of *Abraham Brandon*, I shall not decide without further consideration and a reference to the authorities. The other question is, whether in the events which have happened, the plaintiff, as the only brother of *Abigail Brandon*, is alone entitled to a moiety, or whether the nephews and nieces are to participate with him. On this point I see no reason for suspending my opinion. The question depends on the language of the settlement, which in two passages repeats the words "nearest and next of kin of *Abigail Brandon*;" in the first passage, with the addition of the words "in equal shares among them." The latter words however do not afford the means of deciding the question, as there might be a plurality of persons to be entitled under either of the constructions which are contended for. The question is, whether the property which is limited in this manner is to go to those persons who would be entitled under the provisions of the Statute of Distributions, or to those who answer the description of her next of kin in its natural and proper acceptance. If there be no authority on the subject, the Court must if possible ascertain the true meaning of the parties, and give to the instrument a construction agreeing as nearly as may be with its words. Is there then any obscurity in the words "nearest and next of kin?" In its general acceptance, the term the "next of kin" of any person, would be understood to signify those persons who stand in the nearest degree of relationship to him. The contest is between the brother, a person undoubtedly in the present  
case

1819.

BRANDON  
v.  
BRANDON.

case in the nearest degree of relationship, and the nephews and nieces who are related in a more remote degree. And it is to be considered whether there be any thing in the context to alter the effect of words which of themselves are sufficiently explicit, and to shew that the property shall, notwithstanding these words, belong not to the brother alone, but to him jointly with other persons in a more remote degree of relationship. If this had been a new case, no doubt could have existed that the words are sufficiently explicit; and there could have been no reason why a person who answers the description exactly, should be excluded from the full benefit of the gift. But the argument for the nephews and nieces is, that persons who are not the natural next of kin are admitted by the Statute of Distributions to a share of an intestate's effects. There is however no evidence in this case, that the parties meant that statute to be resorted to. Besides, the statute, although it directs in the third section that the distribution shall be "to the next of kindred in equal degree, or "legally representing their stocks, *pro suo cuique jure*, according to the laws in such cases, and the rules and limitations "hereafter set down," and in the sixth and seventh sections "to every of the next of kindred of the intestate who are in equal degree, and those who legally represent them," does not in any of its clauses speak of the children of a deceased brother or sister as being next of kin to the intestate. They are by that statute admitted to share with the next of kin *jure representationis*; and the distinction between next of kin, and those claiming by representation, is made through the whole of the statute. It is true that we have been in the habit of considering "Next of Kin" as a technical expression; and on a reference to a Master to enquire who are the next of kin of a particular person, it is understood that without any express direction he is to enquire who are the persons entitled under the Statute of Distributions; and if a series of authorities have decided that a particular meaning is to be

be given to those words, it is the duty of the Court to adhere to it. The question then is, whether upon the authorities there is any fixed rule that the words "Next of Kin" shall receive the construction which is contended for on the part of the nephews and nieces. The case of *Phillips v. Garth* (a), is clearly in point. In that case it was decided by Mr. Justice *Buller*, that under a gift to next of kin, the children of a deceased brother and sister were entitled to share with surviving brothers; and if that case had been uniformly followed, and been considered as having established a rule on this subject, I should have been unwilling to recede from it, though I might have entertained a different opinion if the question were open for discussion. It appears however by the statement at the end of that case, that Lord *Thurlow* did not agree with Mr. Justice *Buller*; and the cause having stood over that a petition of appeal might be presented, was ultimately compromised. It was therefore never finally decided. In *Garrick v. Lord Camden* (b), the subject came before the present Lord Chancellor, who said he had long entertained doubt on the case of *Phillips v. Garth*. And in *Smith v. Campbell* (c), Sir *William Grant* put the very case now before the Court; "if the testator had made use of the words 'next of kin,' instead 'of nearest surviving relations,' yet if there had been nothing in the will to shew that he meant the next of kin according to the Statute of Distributions, I should have thought the brothers and sisters would have been exclusively entitled." And his Honour adverted to *Phillips v. Garth*, and to the doubts which Lord *Thurlow* and Lord *Eldon* had expressed on that decision. This opinion was delivered by Sir *William Grant* on a review of all the authorities, and it affords the third instance of a judicial opinion against the case of *Phillips v. Garth*; it was delivered after full consi-

1819.  
BRANDON  
6.  
BRANDON.

(a) 3 Bro. C. C. 64.

(b) 14 Ves. 372.

(c) Coop. C. C. 275.

deration,

1819.

BRANDON

v.

BRANDON.

deration, and after the learned Judge had in effect decided the point in the case then before him, by holding that under the words "nearest surviving relations," the nephews and nieces had no claim. Those words are much less definite than the words in the present case, for the words "nearest relations" were in *Edge v. Salisbury* (a), held not to be sufficiently definite to prevent the necessity of resorting to the statute, and in most of the cases which have been quoted, the word "relations" has been used; and though in some of them there have been the additional terms "poor" or "poorest," "most necessitous," &c. yet the Court has uniformly adopted the Statute of Distributions. But it has been adopted merely as a rule of convenience, the word "relations" being so indefinite, that a distribution in which its meaning should be literally adhered to, would be in many cases impracticable. A similar construction has been given to the word "family" (b), and for the same reason. But notwithstanding this long line of authorities, the late Master of the Rolls, in *Smith v. Campbell*, was clearly of opinion that he did not deviate from any established rule, by holding, that under a gift to nearest surviving relations, surviving brothers would be entitled in exclusion of the children of deceased brothers. If there was no necessity for resorting to the Statute of Distributions in *Smith v. Campbell*, there can be none in the present case, where the words of the trust are much more precise and definite than the terms of the bequest in that case. There is no rule which entitles the Court to depart from the words of the instrument, and to resort to the Statute of Distributions, except in cases where the words of the gift are not sufficiently definite, a reason which does not exist here. Upon the whole I am of opinion that by the clear and definite meaning of the words adopted in this settlement, independent of all

(a) *Ambt.* 70.(b) *Cruys v. Colman*, 9 Ves. 319.

authority

authority on the subject, the plaintiff alone is to be considered as the nearest and next of kin of *Abigail Brandon*; and that the current of authorities being in opposition to the case of *Phillips v. Garth*, I am warranted in deciding according to the opinion which I should have entertained if no such case had existed, namely, that the plaintiff is solely entitled to the moiety in question (a).

1819.  
BRANDON  
v.  
BRANDON.

*The MASTER of the ROLLS.* I have already delivered my opinion that the plaintiff is exclusively entitled under the words "nearest and next of kin," and I see no reason to alter that opinion. He is undoubtedly nearest and next of

July 14.

(a) The following are instances of bequests, the terms of which have been held to be so indefinite as to induce the Courts to resort to the Statute of Distributions, for the purpose of ascertaining the objects entitled to take. "To my relations." *Roach v. Hammond*, *Pre. Cha.* 401. "The relations of E. H. to be divided equally between them." *Thomas v. Hole*, *Forrester*, 251. But it was held in the same case, that the next of kin who were E. H.'s two surviving brothers, and the children of a deceased brother, took in equal shares *per capita*, the statute determining the objects, and the will the shares. "To all and every person and persons who are near relations to me, if any such there be, and if there should be any such person or persons who are related to me, and do not apply for payment within a year after my decease," then over. *Whitborne v. Harris*, 2 *Ves.* 527. "To my wife for her life, and after her decease to my own relations, who shall be then alive." *Green v. Howard*, 1 *Bro. C. C.* 31. "To and among all and every such person and persons who shall ap-

pear to be related to me only, share and share alike; and that such person or persons shall prove himself or themselves entitled to the same in six months after my estates should be sold, except my nephew J. W. to whom I give one shilling only." *Rayner v. Mowbray*, 3 *Bro. C. C.* 234. "To each of my relations by blood or marriage," held to be confined to persons who would be entitled under the statute, and to those who had married persons so entitled. *Devisme v. Mellish*, 5 *Ves.* 529. "To my sister B. C." (who was also sole executrix) "for her own life."—"And it is my absolute desire that my sister B. C. which I have made my only executrix bequeaths at her own death to those of her own family, what she has in her own power to dispose of that was mine, provided they behave well to her with decency and affection." B. C. having made no disposition of the property comprised in the will, it was held, that those who were next of kin of B. C. at her death were entitled. *Crawys v. Colman*, 9 *Ves.* 319.

kin,

1819.

BRANDON  
v.  
BRANDON.

kin, according to the natural and obvious meaning of the words. It is a question arising on the construction of the deed, and not on an intestacy: but even if it were on an intestacy the Statute of Distributions would not apply, for the property of *femes covert* is exempted from its operation (a).

The other question in the cause is attended with more difficulty. The trustees of the settlement seek to retain 500*l.* three *per cent.* bank annuities, or prove it under the commission against *Abraham Brandon*, and to apply the dividends as part of the trust monies comprised in the settlement. The question is whether the trustees, or the plaintiff who is their cestuique trust, have a right to deduct the 500*l.* bank annuities from the moiety which the deed directs to be paid to *Abraham Brandon*. The settlement provided two things to be done in the events which have happened:—First, the trustees were to transfer a moiety of the funded property to *Abraham Brandon*, in the event of *Abigail's* death in his life-time without leaving issue, and secondly, *Abraham Brandon* covenanted that in the same event he would transfer 500*l.* three *per cents* to the same trustees in trust for the benefit of the nearest and next of kin of *Abigail Brandon*. *Abraham Brandon* having become bankrupt in 1793, it is now insisted by his assignees that they are entitled to his moiety. The brother and the trustees on the other hand contend that they have a right to set off against that moiety the 500*l.* stock, either in the way of mutual debt and credit, or of lien; and that the assignees cannot take their share of the fund without satisfying what is due under *Abraham Brandon's* covenant in the deed. For the purpose of considering the question, it is necessary to see what is the state of this property. The bankrupt's interest in it was contingent, and

(a) 29 Car. 2. c. 3.

was not reduced to a certainty till twenty-two years after his bankruptcy. That contingent property, and all the bankrupt's possibility of enjoying it, should it become vested in possession, became effectually transferred to his assignees; so that from the year 1793, they alone were entitled to this contingency, and became at length absolutely entitled to the property; and the trustees in the settlement became as to this portion of the fund, trustees for the assignees. The fund was not derived from the next of kin of *Abigail Brandon*, but from herself, as a part of her own estate by the operation of the marriage contract. On the other hand, the debt claimed by the trustees was due solely by virtue of the personal covenant of *Abraham Brandon*. It was not secured in any other manner, but *Abraham Brandon* engaged to pay in a particular event for the benefit of the next of kin, 500*l.* three *per cent.* bank annuities. It was therefore substantially a covenant by him with his wife before their marriage, that he would in a certain event pay this sum to the trustees. The first question then is, whether the debt under the covenant is proveable under the commission against *Abraham Brandon*. It clearly is not, for it did not exist at the time of his bankruptcy. It was matter of contingency whether any debt would ever arise, inasmuch as it was to depend on the events of his surviving his wife, and of there being no issue of the marriage living at her death, neither of which events happened until twenty-two years after his bankruptcy. The next question is, whether it constitutes a debt which can be set off under the 5 *Geo. 2. c. 30. sect. 28.* And I am of opinion that it is not a case of mutual debt and credit within the operation of that statute. In order to its being within the act the debt must not be contingent; it must be a debt existing at or before the bankruptcy. This debt did not arise till twenty-two years afterwards. It is not a case of mutual debt and credit between the same parties. The property contracted to be given to the husband, moved from the wife,

1819.  
  
 BRANDON  
 v.  
 BRANDON.



1819.

BRANDON  
v.  
BRANDON.

wife, and there is no mutual debt and credit with her or her representatives. Her nominee or next of kin ultimately had a right to the fund, but he did not enter into any mutual debt or credit with the bankrupt. Is there then any equity to charge it on the fund? I think not, for no person is liable to the payment of it except the bankrupt. It is not proveable under the commission. The event which calls on him to pay it twenty-two years afterwards, has alone created the debt. He alone can be called on to pay it. It cannot be charged on a fund belonging to other persons. *The fund is vested in his assignees; and they cannot be called on by any statute or any equity to perform this contingent covenant of the bankrupt. If there be any injustice in the case, it arises from the circumstance of the settlement not having provided that the 500*l.* stock should be a lien on Abraham Brandon's moiety of the fund. There can be no equity to call for the debt of one person out of a fund belonging to others. It would be confounding two distinct rights. The fund is in the hands of the trustees, but the debt is one which is not due from the estate to which the fund now belongs. For these reasons I am of opinion that the two transactions cannot be mixed; but that the assignees must be declared to be entitled to the moiety of Abraham Brandon; and that the debt arising under his covenant cannot be retained by the trustees of the settlement, nor proved under the commission of bankrupt against Abraham Brandon.*

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The PRINCESS of WALES v. The Earl of LIVERPOOL and Count MUNSTER.

1819.

June 29.

July 27.

ON the 17th of *March*, 1818 (a), an order was made in this cause, that the defendants should not be called on to answer the bill until a fortnight after a production should be made by the plaintiff of a promissory note stated in the bill. The note not having been produced, a motion was now made on behalf of the defendants, that the bill might be dismissed with costs.

Mr. *Solicitor-General*, Sir *Arthur Piggott*, and Mr. *Heald*, in support of the motion. If this had been a case where the defendants had answered, they would clearly have been entitled after the interval which has elapsed without any step being taken by the plaintiff, to dismiss the bill for want of prosecution. The peculiarity of the case arises from the circumstance that they have not answered. But they could not answer till the plaintiff had made the production provided by the order; and it being incumbent on the plaintiff to take the first step towards forwarding the cause, the principle on which is founded the common practice as to dismissing bills for want of prosecution, equally applies to this case. Fifteen months have elapsed since the order was made, a period within which the document might have been produced, even if it were necessary to bring it from the most distant part of *Europe*. In the mean time the pendency of this bill, by which a large sum is claimed against the assets of the late Duke of *Brunswick*, entirely prevents the administration of his estate.

Where an order was made that defendants should not be compelled to answer till a fortnight after the plaintiff should produce an instrument stated in the bill, and fifteen months elapsed without any such production, it was ordered on the motion of the defendants, that unless the instrument should be produced by a given day, the bill should be dismissed with costs, which order was afterwards made absolute.

(a) See *ante*, Vol. I. 113.

Mr.

1819.

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The PRINCESS  
of WALES

v.  
The Earl of  
LIVERPOOL.

Mr. *Martin* and Mr. *Shadwell*, contra. The order, though extremely novel in its character, is undoubtedly obligatory on the parties. But it contains nothing mandatory on the plaintiff as to the production. The Court has not ordered the plaintiff to do any act which she has omitted. But the defendants' counsel have supposed the case to be in the same situation as if they had answered the bill. If they had wished to have the bill dismissed, they should have applied for an order for a production of the document within a given time, or that the bill might stand dismissed, and not have moved at once for a dismissal without affording an opportunity for a communication between Her Royal Highness and her legal advisers. Although it may be true that whilst this suit is depending the defendants cannot make a distribution of the Duke's effects, the dismissal of this bill will not prevent the plaintiff from immediately filing another, the effect of which would be the same. It is optional with the defendants to answer without the production, and they can then dismiss the bill if the suit be not proceeded in according to the practice of the Court.

*The LORD CHANCELLOR.*—This motion arises out of a bill filed by Her Royal Highness the Princess of *Wales*, stating herself to be a creditor of her brother, the late Duke of *Brunswick*; making defendants, the Earl of *Liverpool* and Count *Munster* as executors of the Duke, and praying payment out of his assets of a considerable sum of money, alleged to be secured to Her Royal Highness by two different instruments. On the bill being filed, an application was made, supported by an affidavit of Count *Munster*, bringing into question whether this was a real debt, (which, without the slightest imputation on the plaintiff, it might happen not to be,) and reasoning in his affidavit, on the nature and contents of the instrument, to the conclusion that this was not a real debt; and stating for reasons there given,  
that

that the executors could not answer the bill till the securities should be produced. On that occasion, if my recollection be correct, it appeared that the instrument in question was not in this country. The motion then made by the defendants was, that they should be allowed a fortnight before they should be compelled to put in their answer, to be computed from the time of the production of the note. In one sense undoubtedly that motion was novel ; for I do not recollect an instance of such a motion, and it was confidently stated in the argument, that a defendant was not entitled to a production by a plaintiff. But on looking into the subject, I found on principle, and reasoning by the authority of text writers, that where a party pledged himself by oath that he could not answer the bill in such a manner as was required by his duty to the Court, and to those interested in the distribution of the property, unless a production of the instrument should be made, I was satisfied that he had a right to come to the Court, in order to enable himself to put in a full answer ; and I was the more satisfied in the present case, because the instrument in question being one of the securities on which the demand was made, the Court would not make a decree for payment of the money, so long as a duplicate or triplicate of the instrument was existing, and in the hands of other persons than the defendants, but would require that all the instruments should be delivered up. Under these circumstances I made the order which has been adverted to in this discussion. Having already stated that I had found no instance of such an order, it follows that nothing can be stated as the practice consequent on such an order. A motion consequent on it must of necessity be founded on principle, and not on precedent. In common cases, if no step is taken in a cause by the plaintiff for three terms after the period at which the defendant has placed himself in circumstances entitling him to call on the plaintiff to proceed, the defendant has a right to have the bill

1819.

The PRINCESS  
of WALES  
v.  
The Earl of  
LIVERPOOL.

1819.  
 The PRINCESS  
 of WALES  
 v.  
 The Earl of  
 LIVERPOOL.

bill dismissed for want of prosecution. The defendants in this case are in circumstances differing undoubtedly from the ordinary case of a defendant applying to dismiss a bill for want of prosecution; but the circumstances do not afford a material distinction. It is the duty of the plaintiff to proceed; and the question is, whether, by analogy to the common case, the plaintiff here is not bound to proceed in the same manner. At the same time I cannot help saying, that in a case where no positive rule of practice can be resorted to, there may have been some mistake; therefore, unless I say something to the contrary to-morrow, my order on this motion must be understood to be, that unless the instrument be produced before the third seal, the bill shall stand dismissed; but with liberty to the plaintiff to apply at or before the second seal, for an extension of the time.

July 27.

The counsel for the defendants on this day applied for the dismissal of the bill, no production having been made, nor any application for further time; and the counsel for the plaintiff not having any instructions on the subject, the *Lord Chancellor* said there could be no doubt that the bill must be dismissed with costs.

1819.

ROLLS.

July 29.

C. being in the receipt of the rents of an estate in India, under a void devise to her in the will of A., by her own

will (which was also void as to those lands, being unattested,) gave the same estate, and a pecuniary legacy, to B. the infant heir of A.

On a bill by B., against the personal representatives of C., for the legacy, and an account of the rents and profits of the estate received by C. in her life-time: Held, that the plaintiff was not bound to elect, but was entitled both to the legacy and the account.

## GARDINER v. FELL.

ANDREW GARDINER, who was in the Civil service of the *East India Company*, and resident at *Calcutta*, being entitled to lands at *Barrisaul* in *Bengal*, by virtue of the several Pottahs afterwards mentioned, by his will, dated

the

the 6th of *October* 1805, attested by two witnesses only, gave and bequeathed all and every description of property that he was then or might be thereafter possessed of, to *Thomas Brown* and *Christopher Oldfield*, for the purposes therein mentioned; first, he directed his executors before named to discharge all just demands against him; secondly, he directed that his said executors should pay a legacy of 1000*l.*; the remainder of his property he gave and bequeathed unto his mother *Euphemia Gardiner* for her sole exclusive benefit.

1819.  
  
**GARDINER**  
 v.  
**FELL.**

The testator died in *March* 1806, leaving his nephew *James Thomas Gardiner*, the plaintiff, his heir at law. On the testator's death, *Euphemia Gardiner* entered into the receipt of the rents of the *Barrisaul* property; and by her will, dated the 14th of *February* 1812, unattested, gave to her grandson the plaintiff *James Thomas Gardiner* 1000*l.* sterling, "and "also the *Barrisaul* estate, or whatever it may have produced," and she appointed *Catherine Fell* and *E. D. Ross* executors.

The testatrix died in *March* 1813. The bill was filed by *James Thomas Gardiner*, an infant, the nephew and heir at law of the testator *Andrew Gardiner*, against the executors of *Euphemia Gardiner*, for an account of the rents and profits of the testator's real estates received by *Euphemia Gardiner* during her life, and also for an account and payment of the legacy of 1000*l.* given to the plaintiff by her will; insisting that the lands at *Barrisaul* did not pass by the will of *Andrew Gardiner*. The defendants by their answer admitted that *Andrew Gardiner* left the plaintiff his nephew and heir at law, but they alledged that they were ignorant of the tenure of the lands in question, or whether they passed by the will of *Andrew Gardiner*; and they submitted, that the plaintiff was not entitled both to the legacy of 1000*l.* given to him by the will of *Euphemia Gardiner*, and to the estate at *Barrisaul*, but that he ought to be put to his election.

1819.

GARDINER  
v.  
FELL.

It appeared in evidence, that the testator *Andrew Gardiner* was entitled to the estate at *Barrisaul*, under the eight following Pottahs, granted to him by several Natives of the Province of *Bengal*, and which Pottahs, with translations, were proved in the cause.

“ To the High in Dignity, Sujut Mr. *Andrew Gardiner*.

“ *Isa Ramhory Goopto* give this Potta :—

“ My *Talook Kismut Alecanda*, in the alienated *Chuckla Horeenaphoolcea* of *Sorgana Chunderdeep*, is recorded in the name of my elder brother *Chrishncunder Goopto*; and “ I give you a Potta for six spots of ground, measuring, &c.; “ and you will pay the rent thereof at the rate of five Rupees “ per Cance, being the annual sum of *Sicca* three Rupees “ and ten *Anas*. You will dig and fill up, and build brick “ buildings on the land, and continue in the possession of the “ same. To this purport I give this Potta. Year 1208. “ *Phagoon* Month. *English* Year 1802. *February* Month.”

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“ This Potta is granted to Sujut Mr. *Andrew Gardiner*.

“ I, *Sri Horeeradhanath Roy*, write :—

“ Our *Hazoory Talook*, in *Pergana Gerd Bunder*, stands “ in the name of *Horeeradhanath Kismut Boreesal*, is in the “ above *Talook*. Its eastern boundary [here the lands are “ described], for which, together with trees, we, of our free “ pleasure, grant you this Potta. You will pay the rent “ hereof at the rate of five Rupees per Cance, being annually “ *Sicca* seventy-one Rupees and nine *Anas* year after year. “ You will take possession of the aforesaid land, dig and fill “ up, erect brick buildings, &c. and hold possession of the “ same. On these conditions I grant this Potta. *Bengally* “ Year 1208. Date, 1st *Phagoon*. *English* Year 1812. “ Date, Month of *February*.”

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“ To

"To the High in Dignity, Sujut Mr. *Andrew Gardiner*.

"I, *Sri Gopichunder Ghose*, execute this Potta:—

"*Kismut Alecanda*, an alienated *Talook* in the *Chuckla*  
*Horeenaphoolea* in *Pergana Chunderdeep*, stands in the  
 "name of my father *Bhobanychoron Ghose*, of which three  
 "Gundas of land has fallen within your limits; I therefore  
 "grant you this Potta for the three Gundas of land, together  
 "with the trees. You will pay the rent thereof at the rate  
 "of five Rupees per Cance, being annually Sicca twelve  
 "Anas. On these conditions, having taken possession of the  
 "land, you will dig and fill up, erect brick buildings, and  
 "possess it free from interruption. Year 1208. Date,  
 "1st Phagoon. Year 1802. Date, *February*."

1819.  
 GARDINER  
 v.  
 FELL.

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"To Sujut Mr. *Andrew Gardiner*, this Potta is granted.

"We, Sir *Cootoob Fakir* and Sir *Khodabukksh Fakir*,  
 "write:—

"Our *Cheragee* Land is in *Kismut Boreesal*, in *Pergana*  
*Gerd Bunder*. Its eastern boundary is, &c. [here the lands  
 "were described]. We, of our free pleasure, grant you this  
 "Potta for our own *Cheragee* land within the above boun-  
 "daries, commencing from, &c. You will pay the annual  
 "rent thereof at five Rupees per Cance, being Sicca six  
 "Rupees and fifteen Anas year after year. You will take  
 "possession of the aforesaid land, dig and fill up, erect brick  
 "buildings, &c. and keep possession thereof. On these  
 "conditions we execute this Potta. Year 1208, *Bengally*  
 "Style. Date, 1st Phagoon. *English* Year 1802. Date,  
 "Month of *February*."

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"To the High in Dignity, Sujut Mr. *Andrew Gardiner*,

"this Potta is granted:—

"Three *Ana* and a quarter share of *Pergana Chunderdeep*,  
 "forming an alienated *Talook*, formerly belonging to *Sheikh*



1819.  
  
 GARDINER  
 v.  
 FELL.

"*Mahomed Hayat*, was purchased by me at auction; and  
 "the whole of *Jowar Bagoora*, in the aforesaid share, is  
 "mine according to partition. I grant you this Potta for a  
 "spot of land in *Kismut Boreesal*, in the aforesaid *Jowar*,  
 "measuring, &c. for you to erect Godorons thereon. Hav-  
 "ing fixed the annual rent thereof at five Rupees per Cance,  
 "to Sicca two Rupees and seven Anas, I lease it to you.  
 "You will dig and fill up, and erect brick buildings, and  
 "possess the land, paying the rent. To this purport I grant  
 "this Potta. Year 1208: Date, 1st *Phagoon*. *English*  
 "Year 1802. *February* Month."

---

"To Sujut Mr. *Andrew Gardiner*, this Potta is granted.

"I, *Sri Prancrishw Deb*, write:—

"*Kismut Boreesal* is my *Talook*, purchased at auction,  
 "being two Ana share lying in the lands, formerly *Hoceerad-*  
 "*hanath's*, in *Pergana Gerd Bunder*. Its eastern boundary  
 "is, &c. [here the lands were described]. For which, to-  
 "gether with trees, I, of my own free pleasure, grant you  
 "this Potta. You will pay the annual rent of this at the  
 "rate of five Rupees per Cance, being Sicca ten Rupees and  
 "four Anas year after year. You will take possession of  
 "the aforesaid land, dig and fill up, erect brick buildings, &c.  
 "and hold possession thereof. On these conditions I exe-  
 "cute this Potta. Year 1208. Date, 1st *Phagoon*. *Eng-*  
 "*lish* Year 1802. Date, Month of *February*."

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"To the High in Dignity, Sujut The Benevolent Mr. *Win-*  
 "*tle*, this Potta is granted:—

"Three Ana and a quarter share of *Pergana Chunderdeep*,  
 "forming an alienated *Talook*, formerly belonging to *Sheikh*  
 "*Mahomet Hayat*, was purchased by me at auction; and  
 "the whole of *Jowar Bagoora*, in the aforesaid share, is  
 "mine according to partition, and a spot of ground in *Kismut*  
 " *Boreesal*,

“ *Boreesal*, in the aforesaid *Jomar*, is situated to the west of  
 “ the road, &c. The land within these four boundaries mea-  
 “ sures, &c. Having fixed the annual rent thereof to Sicca  
 “ one Rupee and a half, I lease it to you. You will dig and  
 “ fill up, erect brick buildings thereon, pay the rent, and pos-  
 “ sess it. To this purport I grant this Potta. Year 1208.  
 “ Date, 17th *Maugh*.”

1819.  
 GARDINER  
 v.  
 FELL.

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“ To the High in Dignity, Sujut Mr. *Andrew Gardiner*.

“ I, *Sri Ramrutton*, write this Potta :—

“ I have purchased a *Talook*, formerly belonging to  
 “ *Sonaram Khansama*, in *Kismut Alacanda*, in *Chuckla*  
 “ *Horinaphoolia*, of *Pergana Chunderdip*, in the name of  
 “ *Ramcannye Chukerbutty*, seven *Gundas* and a quarter of  
 “ land of which has fallen within the limits of your *Tank*, &c.  
 “ I therefore give you a Potta for this seven *Gundas* and a  
 “ quarter of land, with trees, &c. You will pay the rent  
 “ thereof at the rate of five Rupees per *Cance*, being the  
 “ annual sum of Sicca one Rupee and thirteen *Anas*. On  
 “ these conditions you will take possession of the aforesaid  
 “ land, dig and fill up, and erect brick buildings, &c. and  
 “ continue in possession thereof. Year 1208. Date, 1st  
 “ *Phagoon*. Year 1802. Date, *February*.”

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*Joseph White Sage*, Esq. a Judge and Magistrate of the  
 Twenty-Four *Pergunnahs*, in the Province of *Bengal*, and  
 who had also held the office of Judge and Magistrate for the  
 District of *Bacherguerge*, in the same Province, and had been  
 employed in the judicial department under the Government of  
*Bengal*, for fifteen years, deposed, that he was well acquainted  
 with the general nature of the title or tenure by which  
*Zemindars* or owners of lands in that part of *Bengal*, hold  
 their lands. That the lands in the Province of *Bengal* are  
 generally held by *Zemindars* by descent, purchase, or gift,  
 subject

1819.  
 ~~~~~  
 GARDINER  
 v.  
 FELL.

subject to payment of certain fixed rents or revenue to the Government of *Bengal*, and that such estates are descendible to heirs, according to the laws of the possessors, whether Hindoos or Mussulmans; that the same may, according to the laws and regulations of *Bengal*, be granted, sold, alienated, or conveyed by such Zemindars or owners, and an estate of inheritance may be conveyed or assured to a grantee or purchaser thereof. That each of the several Pottahs proved in this cause is a Pottah in perpetuity, and that an estate in fee in the lands described in the said Pottahs respectively, is thereby respectively granted and conveyed to the grantee, subject to forfeiture only on the non-payment of the rents respectively reserved, and that the lands so granted are descendible to the heirs of the grantee, or may be sold, granted, conveyed, or disposed of by such grantee, subject to forfeiture to the original grantor and his heirs, on non-payment of the rents reserved, according to the construction given to such instruments in the Courts in the Province of *Bengal*, in which the deponent had held judicial appointments.

*James Wintle*, Esq. First Judge of the Provincial Courts of Appeal and Circuit for the Division of *Calcutta* and Province of *Bengal*, and who had been in the judicial and revenue departments under the Government of *Bengal* for twenty-four years and upwards, deposed to the same effect, with regard to the tenure and descent of the lands, and the power of alienation. He further deposed, that the Pottahs proved in this cause are all of the same nature and description, and are commonly called *Riottee* Pottahs, or leases to tenements; and that a perpetual right of occupancy of the lands comprised in the said Pottahs, which may be alienated, sold, or disposed of by the grantee, and which is descendible to heirs (subject only to forfeiture at any period on a failure of payment of the rents reserved, and to an increase of rent, in the event of a sale of the Zemindar's estate, within which

the

the lands granted by the Pottahs are situated, by Government, for arrears of revenue, at the will of the purchaser,) is thereby created and conveyed according to the construction given to such instruments by the Courts of Justice in the Province of *Bengal*.

1819.  
GARDINER  
v.  
FELL.

By a decree made at the hearing of the cause before Sir *William Grant*, on the 17th of *December* 1817, it was referred to a Master to inquire and state to the Court, what is the nature of the interest which the testator *Andrew Gardiner* possessed in the *Barrisaul* estate under the respective Pottahs proved in the cause, and also whether the *Barrisaul* estate, or any part thereof, passed by his will, attested by two witnesses only: reserving further directions.

The Master, by his report, dated the 4th of *August* 1818, certified, that he found that the place called *Barrisaul*, mentioned in the decree, is situate in the District of *Bachergurge*, in the Province of *Bengal*, which Province forms part of the possessions of the *East India* Company, and is subject to the jurisdiction of the Supreme Court of Judicature at *Fort William*. That the estate of the testator *Andrew Gardiner*, at *Barrisaul*, consisted of divers parcels of land purchased by him from several Natives of the Province of *Bengal*, and conveyed by the Pottahs before stated. That upon consideration of the translations of the Pottahs, the will of the testator, and the following affidavits, viz. An affidavit of *Edward Strettell*, Esq. who was in practice as a Counsel in the said Supreme Court of Judicature for upwards of twenty-five years up to and ending in the year 1816, during several years of which period he held the office of Advocate-General; an affidavit of *James Ruddell Todd*, Esq. who resided for ten years in the *East Indies*, chiefly at *Rungpore*, in the Province of *Bengal*, and studied and became intimately acquainted with the language; and an affidavit of *Robert Percy Smith*, Esq. who

1819.

GARDINER  
v.  
FELL.

who was in practice as a Counsel in the said Supreme Court of Judicature, from *September*, 1803, to *March*, 1811, during the whole of which period he held the office of Advocate-General, the Master was of opinion that the interest which the testator possessed in the *Barrisaul* estate was of the nature of fee-simple; and that no part thereof passed by his will, attested by two witnesses only.

The report having been confirmed, the cause now came on to be heard for further directions.

Mr. *Benyon* and Mr. *Richards*, for the plaintiff, contended that the will of Mrs. *Gardiner* being inoperative as to lands, the plaintiff could not be put to his election; and they referred to *Sheddon v. Goodrich* (a), and *Brodie v. Barry* (b).

Mr. *Horne* and Mr. *Abercromby* for the defendants. The first question is upon the right of an *English* heir at law to property in *India*. No one can colonize or reside in that country without licence from the *East India* Company. It does not follow, that because this property is of the nature of a fee-simple estate, it therefore descends to the person who is heir at law, according to the *English* law. It is contrary to the policy of our *Indian* possessions that *European* capital should be embarked in property locally situate in *India*, and should descend to *English* heirs at law; one consequence of such descent would be, that receivers and managers of property in *India* may be appointed by the Courts in this country.

On the point of election, the cases referred to are founded on the Statute of Frauds (c), and are applicable only to *English* property. It does not follow that the will may not be looked at with regard to real estate in *India*, because it could not be looked at as to real estate in *England*. The rule established with regard to wills of real estate in *England*,

(a) 8 Ves. 481.

(b) 2 Ves. &amp; Bea. 127.

(c) 29 Car. 2. c. 3.

is founded on the circumstance, that there is a positive statute, declaring all wills of real estate void as to the heir at law, unless the testator has complied with the requisites of the statute. But no such law may exist as to lands in *India*. The Court may be able to look at an *Indian* will as raising a question of election without its being attested by three witnesses. But independent of these considerations the Court may hold that this will raises a case of election. If a testator in terms gives a legacy by a will not attested according to the statute, on an express condition that the legatee shall give up a real estate, he will be bound to elect. Why may not the same rule be applied where the legacy is given in language indirectly imposing such a condition? This testatrix gives to the plaintiff "1000*l.* and also the *Barrisaul* estate, or what "it may have produced." It is in substance a legacy on condition. The bequest of the legacy must be connected with the devise of the estate. It is not a mere naked bequest of 1000*l.*; but the real meaning of the whole sentence is, that if the plaintiff will take the estate as a bounty under the will of the testatrix, he shall in that case alone be entitled to the legacy.

Mr. *Benyon* in reply. It is clear that lands within the jurisdiction of the *East India* Company must, *primâ facie* and until the contrary appears, be presumed to be subject to the laws of *England*. A devise of real estate, unless the will be attested by three witnesses, is void for the purposes of election as much as for every other purpose. It is immaterial whether the will be void on account of a non-compliance with the requisites of the Statute of Frauds, or for any other reason. In this case it is clear that the will was void as to the lands in question. There is nothing in the will to support the argument of an express condition annexed to the legacy. There is a gift to the heir at law as well of the legacy as of the estate.

1819.  
GARDINER  
v.  
FELL.

The

1819.

GARDINER  
v.  
FELL.

*The MASTER of the ROLLS.* By this bill the plaintiff claims from the personal representatives of *Euphemia Gardiner*, a legacy of 1000*l.*, and also the rents of an estate in respect of the plaintiff's claim to the estate itself. I shall first consider whether the plaintiff makes out a title to the estate. It belonged originally to *Andrew Gardiner*, who died in 1806, having made a will professing to give the whole of his property in very general terms to his mother *Euphemia Gardiner*. The latter, supposing herself entitled to the estate under that devise, made an unattested will, devising it in terms to the plaintiff. His claim therefore to the rents received by *Euphemia* is founded on the supposition that the will of *Andrew* was void, as a disposition of the estate in question. In opposition to the claim, it is said, that admitting the plaintiff to be heir at law of *Andrew Gardiner*, the property was of a nature which did not require that a will, disposing of it, should be attested by three witnesses, the defendants alledging, by their answer, that they are ignorant whether it is freehold or not, but not admitting the invalidity of the will. On hearing the cause, the late Master of the Rolls was of opinion that it was proper that there should be an inquiry in order to ascertain the validity or invalidity of the will as a devise of these lands; the question whether the Statute of Frauds applies to a devise of lands in *India* having been considered doubtful for many years. It is a point respecting which I remember that Sir *William Jones* entertained considerable doubts. It is difficult to know whether our law of real property, much of which is of feudal origin, is to be considered as prevailing in that country. The inquiry was not for the purpose of ascertaining whether *British* subjects can have property in *Bengal*, but of enabling the Court to judge respecting the nature of the interest granted under the *Pottahs* proved in the cause. If it had been suggested that this property was subject to other questions, and that even after the inquiry should be answered, such questions of public

public policy as have been alluded to in the argument for the defendants, were to remain for discussion, it would have been idle to direct the inquiry. I must take the decree which directed it to have been right, and the inquiry not to have been unnecessary. It has been directly answered by the Master. He has found that the nature of the property is that of an estate in fee-simple, and that no part of it passed by a will attested by two witnesses only. He has arrived at this conclusion after having taken the usual course for obtaining information, by receiving the evidence of gentlemen conversant in the law which prevails in the province where this property is situate. But it is said that the report is defective; and that it does not follow, that because the plaintiff is heir at law in the sense to which the term is used here, that he is therefore heir at law in *Bengal*, as to property situate in that country. But when in the pleadings the plaintiff is claiming this property as heir at law of *Andrew Gardiner*, and is admitted to be his heir at law, it must be understood that he is heir at law *quoad hoc*. If it was meant that he was heir at law to property situate here, and not to property in *Bengal*, Sir *William Grant* would not have confined himself to an inquiry whether the will was good, but whether an *English* heir at law would be entitled as such to property situate in *Bengal*. It is a fair inference that the defendants did not contest his right as *English* heir at law to the estate in question. The point mainly contested in the pleadings, is the question of election. The evidence proves the interest in this property to be an estate in fee-simple, of which one of the incidents is, that it is descendible to the heir at law. It is clear that it was understood to descend according to the law of *England*. There was never any doubt that the laws of inheritance are applied in the province of *Bengal*. That must have been known and felt by Sir *William Grant*, for otherwise the decree would have been erroneous. The question was, whether the will was good, and

1819.  
GARDINER  
v.  
FELL.



1819.  
 GARDINER  
 v.  
 FELL.

and being decided in the negative, the consequence was clear.

As to the question of election, I feel that the testatrix made her will under a notion that the *Barrisaul* estate was her own, and without any expectation that she could be called on to account for the by-gone rents and profits. If she had entertained any such expectation, it is probable either that she would not have devised the estate, or that she would have subjected the plaintiff to some condition. But the Court cannot proceed on conjecture, and impose a condition which the testatrix might possibly have prescribed, if her attention had been called to the subject. The question is, whether the words of the will necessarily import that the plaintiff is to be put to his election, or that any condition should be imposed on him? I am of opinion that the words of the will do not warrant me in saying that he is. First, it is clear that a will, attested by two witnesses only, does not put an heir at law to his election. It might have been argued with considerable force, that though invalid as a will, it should be valid for the purpose of raising a question of election. It is equally invalid for the purpose of making a disposition of the estate of another person, as for the purpose of making a disposition of the estate of the testator. It might have been argued, that though void as a will, it was not to be looked at as if it had not existed; and that it should operate by imposing upon the person claiming under it, an implied condition, that he should not take the bounty of the testator, if he claimed the estate in opposition to the will. But it has never been held that the doctrine of implied condition can be resorted to in such a case. Is there then any circumstance to distinguish this case? The argument is rather against its application here, for this testatrix evidently intended to give both the legacy and the estate to the plaintiff. Why should the doctrine of implied condition apply to such a case as the present, when it would not have applied if the estate had not been devised to the same person who would be entitled

entitled if the will was inoperative, but to a stranger? It is said that the plaintiff was intended to take it as the bounty of the testatrix. I cannot infer a condition in the one case more than in the other. That intention would equally appear if the estate had been given to a stranger, and yet no condition could then have been inferred. Why then is it to be inferred in the present case? I cannot find any authority for inferring a condition, though I should have been glad to do so. It would be too much to say, that if the testatrix had known that there was a debt owing to the legatee, she would not have given him the legacy. If so, many cases might be put which would have the effect of altering wills. I cannot clothe it with a condition by conjecture. On these grounds I am unable to decide this case against the heir at law (*a*).

1819.  
GARDNER  
v.  
FELL.

(*a*) In *Hearle v. Greenbank*, 3 Atk. 695, and 1 Ves. 298, a married woman having a power of testamentary appointment over real and personal estate, by her will gave a legacy to her heir at law, and the real estate to other persons. On account of the infancy of the testatrix, the will was void as an execution of the power as to the real estate, which descended to the heir, but it was good as to the personal; Lord Hardwicke held that the heir was not bound to elect, because the instrument was void as to the real estate; and his Lordship compared it to the case of a testator, by a will attested by two witnesses only, devising real estate from his heir at law, and the personal estate to the heir at law, which, though good as to the personal, would be bad as to the real estate; and the devisee of the real estate could not compel the heir to make good the devise before he could be entitled to his personal legacy, because there is no will of real estate for want of the forms required by the statute. So in *Cary v. Aakes*, stated 8 Ves. 492. 496. and reported 1 Cox, 241, the testator having, by a will duly executed, devised to the plaintiff an interest in his freehold estates, afterwards by an unattested paper, (proved as

testamentary) gave a legacy to the plaintiff, and his freehold estates to other persons. Lord Kenyon held, that the plaintiff could not be put to her election, the Court being bound to take no notice of the unattested will as far as it related to the freehold estates. And in *Sheddon v. Goodrich*, 8 Ves. 481, a similar opinion was expressed by Lord Eldon.

The case of *Boughton v. Boughton*, 2 Ves. 12, introduced a distinction between express and implied conditions, which, though much disapproved of, seems to have been adhered to ever since. In that case the testator by an unattested will, gave a legacy to his granddaughter, (who became his heir) and his real estate to his younger son; the will contained a proviso, that if any child of his, or any in their right, or any who might receive benefit by his will, should litigate, &c. the whole or any part thereof, or not comply with every condition therein contained, both as to real and personal estate, such child or children should forfeit all claim under the will, and have no more than the orphanage part of the testator's personal estates. Lord Hardwicke held, that the legatee was bound to elect; the express condition contained in the will, distinguishing

1819.

GARDINER  
v.  
FELL.

" His Honour doth declare that the plaintiff is entitled as  
" heir at law of the testator *Andrew Gardiner*, to the estate  
" at *Barrisaul*, in the Province of *Bengal*, in the *East*  
" *Indies*, and to the rents and profits thereof, accrued since  
" the death of the said testator; and that the plaintiff is  
" also entitled, under the will of *Euphemia Gardiner*, to the  
" legacy of 1000*l.* and interest thereon, at the rate of 4 *per*  
" *cent. per annum*, from the end of one year after the death  
" of the said testatrix, to the day on which the said legacy  
" was paid into the Bank. Refer it to the Master to com-  
" pute such interest, and to take an account of the rents and  
" profits of such estate received by *Euphemia Gardiner*, in  
" her life-time, or by the defendants, or either of them, since  
" her decease, or by any other person or persons, by their  
" or either of their order, or for their or either of their use.  
" The parties to produce, on oath, all books, &c. and to be  
" examined on interrogatories, as the Master shall direct.  
" And his Honour doth not think fit to give costs on either  
" side. Further directions reserved." [A. 1818. Fol. 1930].

guishing the case from *Hearle v. Greenbank*. And this distinction, though the soundness of the reasoning by which it is supported has been repeatedly questioned by succeeding judges, has been attended to in subsequent determinations, and is, I apprehend, to be considered as forming part of the law of the Court. See the observations of Lord *Kenyon*, in 1 *Cox*, 244, of Lord *Eldon*, in 8 *Ves.* 497, and of Sir *William Grant*, in 2 *Ves. & Bea.* 130.

Another distinction prevails on the subject of election, between freehold and copyhold estates. Although the legal estate in copyholds was not in general devisable with-

out a surrender to the use of the will, till the 55 *Geo. 3. c. 192*, and a devise of unsundered copyholds was consequently void at law against the customary heir, yet the Court is not precluded, as in the case of a devise of freeholds void by the Statute of Frauds, from looking at the devise of the copyhold for the purpose of compelling the customary heir to elect between any benefits given him by the will, and his right as customary heir to the unsundered copyhold. See, on this point, *Unitt v. Wilkes*, *Ambl.* 430. *Rumbold v. Rumbold*, 3 *Ves.* 65. *Blunt v. Clitherow*, 10 *Ves.* 589. *Judd v. Pratt*, 15 *Ves.* 168, and 15 *Ves.* 390, and the references.

1819.

WILKINSON v. WILKINSON.

ROLLS.  
March 22.  
June 28. 29.

**JOSHUA WILKINSON**, by his will dated the 30th of April, 1790, gave annuities to his wife and daughters, and devised freehold and leasehold estates to *William and Thomas Wilkinson*, in trust to raise and pay the annuities, and subject thereto in trust for his son *John Henry Wilkinson*, during his life, and after his death, in trust for his children living at his death, in equal proportions. The will contained a proviso, declaring that the annuity before given to his wife, and the provision made for his daughters during their lives, "and the estates given to my said sons for their lives, is and are upon this express condition, that in case they my said wife, sons, and daughters, shall respectively assign or dispose of, or otherwise charge or incur the life estate, the annuities and provision, so made to and for them during their respective lives as aforesaid, so as not to be entitled to the personal receipt, use, and enjoyment thereof; then and from thenceforth the annuity or life estate or interest of him, her, or them, respectively so doing, or attempting so to do, shall from thenceforth cease, determine, and be void, to all intents and purposes whatsoever, and shall immediately thereupon descend to and devolve upon the person or persons who shall be next entitled thereto by virtue of the limitations aforesaid, in such manner as the

A testator devised estates to trustees in trust for his son *A.* for life, and also made provisions for other members of his family, with a proviso, that if they should respectively "assign or dispose of" or otherwise "charge or incur the life estate, the annuities and provision so made to and for them during their respective lives as aforesaid, so as not to be entitled to the personal receipt, use, and enjoyment thereof, then and from thenceforth the annuity or life estate or interest of him, her, or

"them, respectively, so doing or attempting so to do, should from thenceforth cease and determine, and should immediately thereupon descend to the person next entitled thereto, by virtue of the limitations aforesaid, in case he, she, or they were respectively dead."

Held that the life estate of *A.* ceased under the proviso; First, by his signing a memorandum, declaring that his life estate should be chargeable with a debt in case some other property should be insufficient, which event happened:—Secondly, by his executing a power of attorney, authorising a person to receive the rents and apply them in payment of debts due to himself and others, under which *A.* was out of the receipt of the rents and had no control over them for eleven months:—Thirdly, by borrowing money on the credit of future rents, and delivering to the lender, anticipated receipts for the expected rents, and an authority to him to recover and receive such rents for his own use, in satisfaction of the money lent.

" same

1819.

WILKINSON  
v.  
WILKINSON.

" same would have done, in case he, she, or they, was or  
" were then respectively actually dead; any thing herein con-  
" tained to the contrary notwithstanding."

The bill was filed by *Thomas Wilkinson*, one of the trustees under the will, against *John Henry Wilkinson*, and his infant children, and against *William Wilkinson* (the other trustee), and the assignees of *J. H. Wilkinson*, under a commission of bankrupt, for the purpose of having a declaration of the rights of all parties in the rents and profits of the estates given to *J. H. Wilkinson*; suggesting claims made to them, by his assignees; by *J. H. Wilkinson* himself, as not being assignable; by *William Wilkinson*, under a memorandum signed by *J. H. Wilkinson*, charging them with a debt due to *William Wilkinson*, in case a lease which he had deposited with him of other property, should be deficient; and by the children of *J. H. Wilkinson*.

The defendant *William Wilkinson*, by his answer, stated that in 1808, *J. H. Wilkinson* borrowed a sum of money of him, and signed a memorandum as alledged in the bill, and afterwards more particularly stated in the Master's report. It was also admitted by the answer of the assignees.

At the hearing of the cause before Sir *William Grant*, it was referred to a Master, to inquire whether the defendant *J. H. Wilkinson*, had charged or incumbered the life estate and provision made for him by the will, so as not to be entitled to the personal receipt and enjoyment thereof: and the Master having on the 27th of *June*, 1814, stated that he had done so by becoming bankrupt, an exception was taken to his report; and on the 19th of *June*, 1815, it was referred back to the Master to review his report (a), and to receive such further evidence as might be laid before him on behalf of the infant defendants.

(a) *Wilkinson v. Wilkinson*, Coop. C. C. 259.

The Master, by his further report in pursuance of this order, stated his opinion, that by the various acts done by *John Henry Wilkinson*, and specified in the report, *John Henry Wilkinson* had assigned and disposed of, and otherwise charged his life estate and provision by the testator's will made for him during his life, so as not to be entitled to the personal receipt, use, and enjoyment thereof.

1819.  
WILKINSON  
v.  
WILKINSON.

The facts stated in the report were in substance as follows.

1st. It appeared by the affidavit of *J. H. Wilkinson* himself, that in *October 1807*, being considerably indebted, he executed an assignment to *Wathen, Cooper, Nunn*, and himself *J. H. Wilkinson*, as trustees for the payment of his debts. The deed was not produced: parol evidence of its contents was entered into, but the evidence was contradictory; some of the deponents stating that it was confined to his book debts, and a sum to be awarded due to him from his late partner, and that it had been objected to by some of his creditors, as not comprising his whole property: others stating that it was an assignment of his whole property, including his life estate under his father's will. There was also some evidence of the rents of this property having been received on behalf of *Nunn*, who was one of the trustees, and by him applied pursuant to the trusts of the deed. It also appeared that *J. H. Wilkinson*, on his last examination under his bankruptcy, had stated, that he had not charged or incumbered his life estate. There was no evidence shewing the present custody of the deed. It appeared to have been deposited with a person of the name of *Watson* for the use of *Nunn*, one of the trustees.

2d. *J. H. Wilkinson* being previous to *September 1798*, indebted to *Thomas Bull* in 200*l.*, and to several other persons, particularly to *Jones* and *Wakeman* in about 200*l.*,

1819.

WILKINSON  
v.  
WILKINSON.

applied to the defendant *W. Wilkinson* to pay the amount of *Jones* and *Wakeman's* debt, which he consented to do, provided he was secured the repayment out of the rents and profits of his lifehold estates; and provided *J. H. Wilkinson* would give a power of attorney, and full authority to *Thomas Bull*, the then collector of such rents, in addition to one he then held, to receive the rents of such estates, and to pay over the same to *W. Wilkinson*, until he was fully repaid the 200*l.* so to be advanced by him to *Jones* and *Wakeman*, or other creditors. On the 8th of *October* 1798, a power of attorney was accordingly executed by *J. H. Wilkinson* to *Bull*, empowering him in the first place to reimburse, and pay to himself, out of the rents and profits of the said life estate, all and every such sum or sums of money as he had theretofore advanced to *J. H. Wilkinson*; and in the second place, to pay them over to *W. Wilkinson*, until he was fully repaid the 200*l.* to be paid by him. From the time of the execution of the power of attorney, till and after the 29th of *September* 1799, being a space of eleven months, *J. H. Wilkinson* was entirely out of the receipt of the rents and profits of the estates, nor had, during that period, any controul over the same, nor did he receive any money therefrom. On the 6th of *November* 1801, an account current was sent by *William* to *J. H. Wilkinson*, in which credit was given to the latter for several sums received of *Bull*. It appeared that in 1798 or 1799, a person was employed by *Thomas Bull* to distrain for rent on various tenements belonging to *J. H. Wilkinson* under his father's will, and that the rents thus distrained for were paid over to *Bull*.

Sd. In the year 1808, *J. H. Wilkinson*, being in want of money to pay off a debt for which an execution was then about to be entered on his premises, and for other purposes, borrowed of *W. Wilkinson* 396*l.*; and as a security for the same, deposited with him not only the lease of a house at *Handsworth* (being no part of the estate of his father), but on the 26th of  
May

May 1808, signed the following memorandum of agreement:—

“ This lease is to be a security to Mr. *W. Wilkinson* for the sum of 396*l.*, interest, and expences, advanced to me in money, and in case it shall not be sufficient, my life estate to be chargeable for the deficiency in my father's estates. *J. H. Wilkinson.* London, 26th May 1808.” It was understood by *W. Wilkinson* that the *Wandsworth* lease was not worth the money lent upon the mortgage; and he therefore insisted on and obtained the repayment to be secured or charged upon the defendant's life estate under his father's will. The *Wandsworth* property was afterwards valued on the part of the assignees of *J. H. Wilkinson* by a surveyor, who reported that it was not of sufficient value to cover the money borrowed: it was afterwards valued by two other surveyors, who reported its value to be 320*l.*; and the lease had subsequently become of no value. The transaction between *J. H. Wilkinson* and *W. Wilkinson* was supported by the affidavit of the former, and of the solicitor who prepared the memorandum. It was also stated in the same manner in the answers of *W. Wilkinson*, and of the assignees.

1819.  
WILKINSON  
v.  
WILKINSON.

4th. The defendant *J. H. Wilkinson*, by his affidavit, stated, that in 1807 and 1808, he was constantly in the practice of raising and borrowing money on the credit of the rents to become due, and for that purpose delivered over receipts for such expected rents, to *Edward Nunn*, *John Norrish*, and other persons, similar to the transactions with *Duppa Jenkins* afterwards mentioned. That on the 17th of December 1808, *J. H. Wilkinson* borrowed of *Duppa Jenkins* 58*l.* 17*s.* 6*d.*, and by way of securing the repayment thereof, signed the following memorandum:—“ *London, December 17, 1808.* I hereby acknowledge to have received of Mr. *Duppa Jenkins*, jun. the sum of 58*l.* 17*s.* 6*d.* for the rents stated at the end of this, and numbered as per receipts, No. 1, 2, 3, 4. And I hereby authorise him to collect the same, and to repay himself the said sum of

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“ 58*l.* 17*s.* 6*d.*



1819.  
  
 WILKINSON  
 v.  
 WILKINSON.

" 58*l.* 17*s.* 6*d.* advanced to me; and for that purpose he has  
 " my receipts upon the parties so stated and numbered as at  
 " the end of this acknowledgment. I do authorise him to  
 " receive the same for his own use and benefit, without my  
 " having any claim whatever upon the said rents, they being  
 " his sole property for the advance so made to me. And  
 " I do hereby authorise and direct the parties on whom the  
 " receipts are, to pay the same to him or any person that  
 " may be sent by him to receive the same, producing my  
 " receipts as before stated; and in case of default of payment  
 " by either of the said parties, this shall be full power for  
 " him to seize or distrain in my name for the said rents, or  
 " in the name of the trustees, under a power of attorney  
 " given by them to me for that purpose, to receive the said  
 " rents from the broker so seizing or distraining, and apply  
 " the same to his own use; and this shall be sufficient au-  
 " thority for any broker so seizing and paying over to the  
 " said *Duppa Jenkins* the monies so received. *J. H. Wil-*  
*kinson.*" At the end of this memorandum was a list of  
 tenants of the property in question, and of their respective  
 rents, amounting in all to 58*l.* 17*s.* 6*d.* These transactions  
 were also supported by an affidavit of *Duppa Jenkins*.

The defendants, the assignees of *John Henry Wilkinson*,  
 excepted to the report, and the exception now came on for  
 argument.

*Mr. Wetherell* and *Mr. James Stephen* in support of the  
 exception. The only transaction stated in the report, which  
 could be considered within the meaning of the condition, is  
 the deed of trust supposed to have been executed by *John*  
*Henry Wilkinson* for the benefit of his creditors; but that  
 deed has not been produced. No sufficient evidence has  
 been given of its contents, or that it included his life interest  
 in the property in question. It is contrary to every rule of  
 evidence to act on the supposed existence of such a deed,  
 under

under the circumstances stated in the report. No evidence is given by the solicitor who prepared it.

This is a penal proviso, and is not to be extended beyond the letter. The first question to be considered is, whether the testator meant that the estate should cease, if his son should attempt to alienate for a year, or some other limited period of time; or whether he intended to prevent a total alienation of his whole interest. It is extremely improbable that he meant the estate to cease on an actual or attempted alienation by mortgage or charge for a year or half a year. Conditions restraining assignment of leases have been held not to apply to an underletting, unless the condition provides that the lessee shall not assign the term or any part thereof. The same principle applies by analogy to the present case. But if the Court should be of opinion that it includes an actual or attempted partial alienation, the acts stated in the report do not amount to a breach of the condition. The transaction with *Bull* amounts merely to this; he had paid a sum on account of *John Henry Wilkinson*, and the latter authorises him to reimburse himself out of the rents of the estate. The transaction with *Jenkins* is of the same nature. The testator could not intend such an act to be a forfeiture. With as much reason would it be a forfeiture, if a person anticipates his income by a year, or tells his receiver to pay a bill for him when the rents are received. It does not appear that the power of attorney given to *Bull* was more than a power to receive the rents for the owner. It was not an alienation. One of the witnesses who states that he had distrained the goods of some of the tenants, establishes the fact that *John Henry Wilkinson* himself was in possession subsequent to the execution of the power of attorney; for he mentions the fact of his having been employed by him to distrain in 1798 or 1799. This shews that the dominion of the property still remained in *J. H. Wilkinson*. A power of attorney is neither an alienation nor an attempt to alienate. It is a revocable instrument. The direction to the attorney

1819.

WILKINSON  
v.  
WILKINSON.

1819.

WILKINSON  
v.  
WILKINSON.

to pay debts out of the rents of the estate, is in no sense a parting with the ownership; it is a mode of enjoyment. It could not be the testator's intention that his son should be obliged to receive the money *propriis manibus*. If he had borrowed a sum of his bankers, and directed that it should be paid to them out of the rents by the receiver, it would be a most extravagant interpretation of the clause, to say that such an act would be a forfeiture.

With regard to the memorandum given to *William Wilkinson*, a Court of Equity, on a bill filed for the specific performance of that instrument, would not have compelled the execution of any deed which could have amounted to a forfeiture. The proviso must be taken altogether: the act meant to be restrained is not merely actual or attempted alienation or incumbrance of the property: the assignment or incumbrance made or attempted must be such as would prevent *J. H. Wilkinson* from being "entitled to the personal receipt, use, and enjoyment." So that if an actual mortgage had been made, and the mortgagor had regularly paid the interest, it would not have been a forfeiture, for his personal enjoyment would not be interrupted. But there was not in fact any direct contract to execute a charge on the life estate. It rested in contingency. The case might have been different, if an actual deed had been executed. No authorities can be produced to shew that forfeiture has been incurred by such acts as those which are stated in the report; but there are several cases which by analogy are authorities in favour of this exception. In *Doe v. Carter (a)*, a condition that the lessee should not assign or otherwise part with the lands demised, was held not to be broken by a creditor's taking the lands in execution under a judgment entered up on a warrant of attorney given by the lessee. And yet the creditor might there have immediately sold the term. In *The King v. Robinson (b)*, an annuity was given

(a) 8 T. R. 57.

(b) *Wightwick* 386.

as an unalienable provision for personal use and support of the annuitant, with a proviso, that if he should sell, assign, transfer, or make over, or otherwise attempt to alienate the annuity, or do any act, deed, matter, or thing, to charge, alienate, or affect the same, the trustees should have power to suspend or determine the annuity; and it was held that the outlawry of the annuitant was not such an act as gave the trustees a power to suspend or determine the annuity. The cases as to anticipation by married women of property settled to their separate use, are applicable to the present question. Under trusts of that description there may be an anticipation, unless it be excluded by express words. They also referred to *Dommett v. Bedford* (a), *Brandon v. Robinson* (b), and *Shee v. Hale* (c).

1819.  
WILKINSON  
v.  
WILKINSON.

Mr. Hart, Mr. Horne, and Mr. Rose, for the report. This is a case in which the interests of infants are affected, and which calls for all the anxiety of the Court on their behalf. The simple question is, whether the estate of *J. H. Wilkinson* is determined, and the infant defendants consequently entitled. An estate for life may be made determinable on bankruptcy, insolvency, or any other event prescribed by the testator: and the persons entitled on the happening of the event do not take by forfeiture. The effect of the limitation over was to narrow that which was first given as an absolute life estate, to a life estate with certain qualifications. Those qualifications are, that there shall be neither an act nor an attempt to pass it to other person. It cannot be contended that the testator had not the right so to qualify it. It is an estate for life determinable by the party's alienating or attempting to alienate: in that event, it is to go over to others. The question therefore does not turn on the doctrine of forfeiture. It is material that

(a) 6 T. R. 684. 3 Ves. 119.  
(b) 18 Ves. 429. 1 Rose, 197.

(c) 13 Ves. 404.

1819.

WILKINSON  
v.  
WILKINSON.

the interest of *J. H. Wilkinson* was not a legal but an equitable interest, and that the question must therefore be determined in a Court of Equity. An attempt to alienate an equitable estate by means of a power of attorney authorising another person to receive the rents, or by an agreement, is itself an alienation in equity. If we can shew an agreement, it is impossible to contend that there has not been an equitable alienation. But if there be even an attempt to pass the rents and profits, the argument would be unanswerable. This power of attorney was given for a valuable consideration, and was therefore not revocable even at law. But if revocable at law, it could not be revoked in equity. As to the supposed want of evidence of the deed of assignment, the Court will not preclude the remainder-men from the benefit of the limitation over, because they cannot produce the deed. It is an instrument of which they never were nor could be the depositaries. It is clear that *John Henry Wilkinson* intended to conceal the transactions. It appears that *J. H. Wilkinson* himself was one of the trustees; a plan which was probably adopted, in order that he might remain in possession as ostensible owner, and yet be in reality a trustee. The Court will presume that under the bankruptcy every thing was done which ought to have been done. The Court cannot suppose that the bankrupt did not deliver up the deed to his assignees. But the agreement with *William Wilkinson* puts the case beyond all doubt; it is set out *verbatim* in the Master's report. The cases in which assignments by operation of law, as bankruptcy, or the insolvent acts, have been held not to be forfeitures, have no application here; for the language of this will would be sufficient to include acts of those descriptions. But if it turned on the question of bankruptcy, it may be observed, that the first report of the Master was not founded on the proposition that bankruptcy in general would be within the meaning of the clause, but that the bankruptcy of this party under the particular circumstances attending it, was within the operation of the proviso.

*The*

*The MASTER of the ROLLS.* The question for the determination of the Court is, whether, on the evidence and the report, it appears that the defendant *John Henry Wilkinson* has done any acts of the description mentioned in the condition contained in the will. It is insisted by the defendants, the children of *John Henry Wilkinson*, that he has, and that his estate has consequently ceased. It is well settled, that it is competent to a testator thus to qualify a life estate, taking care not to infringe any rule of law. The question then is, whether this is a life estate qualified by and subject to a condition not to do the acts specified in the proviso. It is a question which has arisen in a variety of cases, and the rules respecting it are of considerable antiquity. It has occurred in cases reported in *Dyer* (a), in *Leonard* (b), and other old reporters (c); and the more modern books contain many instances of similar provisions, though they are not looked at by the Courts with much favour. The principles on which the law applicable to this subject is founded, are clearly stated by Lord Kenyon in *Doe v. Carter* (d): "Generally speaking, the grant of an estate carries with it all legal incidents, and therefore the grantee has a right to sell and convey it, unless he be controlled by the terms of his grant. In the case of *Lord Stanhope v. Skeggs*, Lord Mansfield seems to have doubted on this ground, whether or not the covenant that the executors of the tenant should not assign were void as being inconsistent with the thing granted; but in so doubting, his Lordship probably overlooked the maxim, *modus et conventio vincunt legem*; though indeed that maxim is to be taken with some qualification. For a grantor, when he conveys an estate in fee, cannot annex a condition to his grant not to alien, nor when he conveys an estate tail, a condition not to bar the entail. Such restrictions are imposed to prevent perpetuities: but, short of that

1819.  
WILKINSON  
v.  
WILKINSON.

(a) *Dyer*, 6 a.

(b) 1 *Leon*. 3.

(c) See the earlier cases collect-

ed in Mr. Justice Lawrence's judgment in 8 T. R. 63.

(d) 8 T. R. 69.

" restriction,

1819.

WILKINSON  
v.  
WILKINSON.

"restriction, both parties to a contract may model it in what manner they please. Though therefore the grant of an estate *prima facie* carries with it all legal incidents, that grant may be modified according to the wish of the parties; and when we are considering the rights of the grantee, it is necessary to see what restraints are imposed on him."

His Lordship then adverted to a distinction in the case before him, between an act by the party himself and an act operating in invitum, a distinction which also prevailed in *The King v. Robinson (a)*, and has no application to the present case. The general principle therefore is clear. The question then is, how far the acts committed by *John Henry Wilkinson* are within the operation of the proviso. The acts insisted on are four. One of those, the execution of the deed of trust, would, if proved, put an end to all argument. It is said to have been a deed executed by *John Henry Wilkinson* vesting all his property in trustees (one of whom was himself) for the benefit of his creditors. If that fact were made out, it would be a direct transfer and conveyance of the estate in question. But it is denied by the assignees that this deed contained any conveyance of the life estate. To ascertain that point, nothing would be necessary but the production of the deed. On this part of the case the single question is, whether so far as the deed is concerned this fact is *made out*. It is immaterial whether the claim be by an infant or an adult person. The rules of evidence are precisely the same in a case in which infants are asserting a claim as in any other case. The claimant must establish his case by legal evidence. Nothing can be clearer than the rule of law, that the best evidence must be produced of which the nature of the case admits, and that a party seeking to establish his title by the contents of an instrument, must in general produce the instrument. That the production may be attended with difficulty is immaterial. The question is, whether parol evidence of its contents ought in this case to be received. The exist-

(a) *Wightwick* 386.

ence of the instrument being admitted, there is no doubt respecting the grounds on which secondary evidence is to be received, viz. the loss of the instrument, or if it be in the possession of the opposite party, its non-production after notice to produce it. In this case the loss of the deed is not proved. It is proved to have been in existence after the bankruptcy of *John Henry Wilkinson*. It is proved by the witness *Newby* that it was given to him to be carried to *Guild-hall*, and that it was carried thither by *Nunn*, one of the trustees, that it was deposited at *Watson's* house for the use of *Nunn*, and that it was afterwards taken away. There the evidence stops. It should have been stated when and by whom it was taken. But these facts do not appear. *Nunn* was living four years after this bill was filed, and five years after the bankruptcy. Notwithstanding this, the deed remains with the trustees, and not with those who were entitled to the bankrupt's estate. It is said that the assignees withhold it, because, if produced, it would be strong evidence against them; but that is begging the question. What evidence is there to shew that it ever came to their hands? It is said that *John Henry Wilkinson* delivered it up at his bankruptcy, but to whom or at what time such delivery was made does not appear. The party bound to produce the deed does not produce it. If the assignees have it, why are they not examined on the subject? Why did not the bill interrogate them as to the fact, and by a short sentence in their answers it would have been explained? Though the bill contained no interrogatory on the subject, yet when the late Master of the Rolls permitted the infant defendants to offer additional evidence, they might, by a short process, have called on the assignees to answer relative to the existence and the present custody of this deed, and by that means have saved the expence of the voluminous evidence which has been entered into. Parol evidence however was resorted to before the Master, and it does not distinctly appear that any pointed objection was taken to it: for I cannot but think that if the

Master's

1819.

WILKINSON  
v.  
WILKINSON.



1819,  
  
 WILKINSON  
 v.  
 WILKINSON.

Master's attention had been drawn to the subject, he could not have received the evidence. Evidence was offered of the contents of the deed. If I were at liberty on this part of the case to look into that evidence, which however I am not, my conclusion would have been that the deed did not contain any assignment of the life estate. The parties seem to have been aware that a forfeiture would have been the consequence of including it. The solicitors do not say that it contained the life estate, but merely an assignment of his book debts; and this is in some degree confirmed by the last examination of the bankrupt, in which he stated that it did not contain the life estate, though it was understood at the execution of the deed that it was to be included. But it would be extremely mischievous to relax the rules of legal evidence, and after the lapse of several years to receive evidence of persons deposing to the contents of a deed from their recollection. If the question depended on the deed, it would have been a matter worthy of consideration whether the Court should not now endeavour to obtain a production of it, and whether it would not even now permit some inquiry to be instituted respecting it; though undoubtedly before such permission would be granted, the Court would require some reason to be given for its non-production before the Master,

The other acts which are relied on as amounting to a forfeiture of the life estate are, first, a power of attorney given by *John Henry Wilkinson*, in *October 1798*, to *Thomas Bull*, authorising him to receive the rents, and out of them to pay to himself sums which he had previously advanced to *John Henry Wilkinson*; and afterwards to pay the rents to *William Wilkinson* till he should be reimbursed a sum to be advanced by him on account of *John Henry Wilkinson*: Secondly, an agreement, dated the *26th of May, 1808*, by which it is declared that *John Henry Wilkinson* had deposited the lease of a house at *Wandsworth*, with *William Wilkinson*, as a security for 396*l.* and that in case it should not be sufficient, his life estate

estate to be chargeable for the deficiency: and, thirdly, the anticipation of the rents in favour of *Duppa Jenkins*, by delivering to him receipts for those rents before they were due, accompanied by an authority to receive and recover the rents for his own use, without any claim on the part of *John Henry Wilkinson*. The question is, whether these acts, or any of them, come within the operation of the proviso in the will. On a general view of the case it is impossible to say that they are not directly in violation of the testator's intention. His son *John Henry Wilkinson* appears to have been in trade, and the intention was, that he should himself have the personal enjoyment of the property. It is impossible not to see that in the year 1798, two years after *John Henry Wilkinson* had succeeded to the property by the determination of a preceding life estate, he was in embarrassed circumstances, and from that year to the year 1809, struggling with his embarrassments, and though aware of the restrictive clause in the will, endeavouring to avoid its operation by contrivances for incumbering his life estate, and for parting with it to creditors, in such a manner as not to amount to direct mortgage. It is however properly argued that the acts done by him must be brought within the letter of the prohibition. There is a fallacy in the argument that the words "assign or dispose of" must be construed as applying only to a complete assignment, and not to a partial disposition. If that were well founded, the effect would be, that he might, during his whole life, by a series of partial dispositions, part with all the rents and profits, and yet the acts would not be within the operation of the proviso. But the words of the clause are, "that if he should assign or dispose of, or otherwise charge or incumber the life estate, so as not to be entitled to the personal receipt, use, and enjoyment thereof, the life estate, &c. of him, her, or them so doing, or attempting so to do," shall cease, &c. The acts which I have stated are directly within the meaning of the phrase. The words "attempting so to do," are not new, for similar words occurred

1819.  
WILKINSON  
v.  
WILKINSON.

1819.

WILKINSON  
v.  
WILKINSON.

occurred in *The King v. Robinson* (a), though that case was determined on another ground. The fact of the execution of a power of attorney to *Bull* is not denied. He was a creditor, and it was to enable him to pay himself and another creditor out of the rents. It was ingeniously argued by Mr. *Stephen* that a power to receive rents amounts to nothing, that it could not be intended by the testator that his son should always receive the rents *propriis manibus*, and that it was sufficient that he should retain the dominion over them. It was properly answered that a power of attorney given for a valuable consideration is not revocable. It was an equitable security, and gave to the party to whom it was granted, an authority to withhold the rents from *John Henry Wilkinson*, and apply them in payment of his own debt, and that of *William Wilkinson*. What is a security by *vicum vadium* but an authority to the lender to receive his debt out of the profits of the estate? During the existence of the power of attorney, *Bull* might have refused to pay the rents to *Wilkinson*, because he was authorised to receive and apply them himself. It was not an absolute parting with the whole life estate, but it was "charging and incumbering it" for a time, "so as not to be entitled to the personal receipt, use, "and enjoyment." The great object of the will is to contrast the giving it to others, with the enjoyment of it by the devisee himself. It would be trifling with the will to say that it shall depend on the form and mode in which the alienation is made. This act alone would in my opinion be sufficient. The mortgage or agreement of the 26th of May, 1808, which is admitted by the answer of the assignees, and was also stated in the first report of the Master, was clearly a charge on the life estate. It is said not to have been an absolute but a conditional charge. But was it not an attempt to charge? And if the property at *Wandsworth* were no-

(a) *Hightwick* 386.

toriously deficient in value, it cannot be said that it was not a direct charge. According to that argument, even a direct mortgage would not be within the meaning of the condition, provided the mortgagor continued in the receipt of the rents and profits. The last act which is insisted on, is the anticipation of the rents. It appears by a written agreement, very clearly expressed, that *Duppa Jenkins* was authorised to go to the tenants, with liberty to receive the rents as his own property, and without being subject to any claim by *John Henry Wilkinson*. It is said that this was merely the act of a landlord directing another person to receive his rents. But it is impossible to say that he retained the personal receipt, use, and enjoyment of the property, when he had for a valuable consideration given the power of receiving the rents to another. It is contended that every landlord gives a similar authority to his bailiff: but the analogy is rather between this case and that of the species of security to which I have before adverted, and which gives to the lender an authority to receive the rents for his own benefit until his debt shall be satisfied. Upon all these three latter points, and laying the deed of assignment out of the case, I am clearly of opinion that the Master has come to a right conclusion. I am surprised that the subject of the bankruptcy should have been alluded to in the argument; it is not mentioned in the second report, and the point respecting it was decided by the late Master of the Rolls.

Exception over-ruled.

1819.  
  
 WILKINSON  
 v.  
 WILKINSON.

MATTHEWS

1819.

ROLLS.

July 3. 5. 28.

## MATTHEWS v. PAUL.

A testatrix bequeathed Bank stock to trustees, in trust, to pay the dividends to her daughter *M.* for life, for her separate use, and after her death to her husband for his life, and after his death to assign and transfer all such stock unto and among all and every the children of her daughter *M.* (except an eldest son) equally, and if but one, the whole to such one or only child, to be

vested interests and transferable at their, his, or her ages or age of twenty-one years: and in case any such child should die under that age, leaving any child or children, then the share of every child so dying to go to such their, his, or her children or child in like manner as above mentioned, otherwise to go to the survivors or survivor of the children of her daughter, and to be transferable in like manner as their original share: and in case her daughter should have no children, or they should all die under twenty-one, without children, then to transfer the Bank stock to such persons, &c. as her daughter should appoint. She also bequeathed Imperial renewable annuities, and other stock, to the trustees, in trust, to receive the dividends, and invest them in stock until the expiration of the term for payment of the Imperial annuities, and thereupon assign and transfer all such stocks or funds as well original as accumulated, unto and among all and every the children of her daughter (except an eldest son) equally; and if but one, then the whole to such one or only child, the same to be vested interests and transferable, and the dividends or interests thereof applied at such time, &c. and with the like power of appointment by her daughter as was directed concerning the Bank stock. At the date of the will, and at the testatrix's death, *M.* had two sons, *J.* and *W.*—*J.* the eldest, died in the life-time of his parents, before the expiration of the Imperial annuities, and before *W.* attained twenty-one.

Held, that *W.* having become an only son by his brother's death, was not entitled to any share either of the Bank stock, or the funded property; although a family estate, of which *J.* had been tenant in tail, did not by his death become vested in *W.*, a recovery having been suffered by *J.* and the estate devised by him to his father.

*ANN MATTHEWS*, by her will, dated the 31st July, 1801, gave to trustees all such Bank stock as she should leave at her death, in trust to pay the dividends to her daughter *Mary* the wife of *John Paul Paul*, during her life, for her separate use; and after her decease to pay such dividends to *John Paul Paul* during his life; and after his decease, "Upon trust that they, the said trustees, do and shall assign and transfer all such stock unto and among all and every the children of my said daughter, if more than one, (except an eldest son) equally share and share alike; and if but one, then the whole to such one, or only child; the same to be vested interests and transferable at their, his, or her ages or age of twenty-one years; and in the mean time and until such children or child shall attain such age, from time to time to invest and improve their respective shares or share of the dividends of such stock, for such children or child's future benefit and advantage.

" And

1819.

MATTHEWS  
v.  
PAUL.

“ And in case any such children or child shall die under the  
 “ said age, leaving any children or child lawfully begotten,  
 “ then the share or shares of every such child so dying, to  
 “ go unto or among such their, his, or her children or child,  
 “ in like manner as above mentioned, otherwise to go to the  
 “ survivors or survivor of the children of my said daughter,  
 “ and to be transferable in like manner as their original  
 “ share thereof. And in case my said daughter shall leave  
 “ no children or child at her decease, or leaving such, they  
 “ shall all die under the said age of twenty-one years,  
 “ without children as aforesaid, Then Upon Trust that they  
 “ the said trustees do and shall assign and transfer all such  
 “ stock unto such person or persons,” &c. as her said daughter  
 “ by deed or will should appoint, and in default of appointment,  
 “ then in trust to assign the same unto the testatrix’s  
 “ nephew *Walter Matthews*, for his own use. The testatrix  
 “ also bequeathed to the same trustees all such interest or  
 “ share as she should leave at her decease in the 5 per cent.  
 “ bank annuities, 1797, (commonly called Loyalty,) and in the  
 “ Imperial Terminable Annuities, “ In trust to stand possessed  
 “ of all such annuities, and to receive the dividends or interest  
 “ thereof from time to time as the same shall become  
 “ due and payable; and thereupon to lay out and invest the  
 “ same in the purchase of 5 per cent. annuities, 1797, or  
 “ such other stocks or funds as they shall think fit, being  
 “ government securities, in their names, and so in like  
 “ manner from time to time to lay out and invest all the  
 “ dividends or interest to be received thereon, so as all such  
 “ stocks or funds do thereby accumulate until the expiration  
 “ of the term for payment of the Imperial Annuities; and  
 “ thereupon to assign and transfer all such stocks or funds,  
 “ as well original as accumulated, unto and among all and  
 “ every the children of my said daughter, if more than one,  
 “ (except an eldest son,) equally share and share alike, and if  
 “ but one, then the whole to such one or only child; the  
 “ same to be vested interests and transferable, and the di-  
 Vol. II. F “ videnda

1819.

MATTHEWS

v.  
PAUL.

“ videnda or interest thereof applied at such time or times,  
 “ and in such manner, and with the like power of appoint-  
 “ ment by my said daughter, as is hereinbefore mentioned  
 “ and directed of and concerning the Bank Stock herein  
 “ before given in trust for the benefit of the children of my  
 “ said daughter; and in default of my said daughter making  
 “ any such gift, direction, limitation, or appointment there  
 “ of, in trust to assign and transfer the same unto my afore  
 “ said nephew *Walter Matthews*, his executors, administra-  
 “ tors, or assigns, to and for his and their own use.”

By a codicil dated the 9th of *March*, 1802, the testatrix devised to the trustees named in her will, the reversion in fee-simple of certain freehold estates, upon trust, for the separate use of her daughter *Mary Paul* for her life, and from and after her decease, “ Upon Trust to stand possessed  
 “ as well of the said estate and premises as also of the rents  
 “ and profits thereof in the mean time, to and for the use,  
 “ benefit, and behoof of *Walter Matthews Paul*, second son  
 “ of my said daughter *Mary Paul*, his heirs and assigns for  
 “ ever, and to convey the same to him upon his attaining his  
 “ age of twenty-one years: but if my said grandson, *Walter*  
 “ *Matthews Paul*, should happen to die before he attains his  
 “ said age, then my said trustees are also to stand possessed  
 “ thereof in trust to and for all and every other the children  
 “ of my said daughter, who shall live to attain the age of  
 “ twenty-one years, if more than one, (except an eldest son,)  
 “ their heirs and assigns, share and share alike, as tenants in  
 “ common, and not as joint tenants; and if there should be  
 “ but one child, then in trust for such one only child, his or  
 “ her heirs and assigns for ever, and to convey the same to  
 “ them, him, or her accordingly; and in case my said  
 “ daughter should leave no children or child living at her  
 “ decease, or leaving such, they should all die under the  
 “ said age of twenty-one years, then upon this further trust,  
 “ and it shall be lawful for my said daughter, notwithstand-  
 “ ing her coverture, by any deed or writing to be executed by  
 “ her

" her in the presence of and attested by two or more credible witnesses, or by her last will and testament in writing, to be signed and published in the presence of three or more such witnesses, to give, &c. the same estate or any part thereof unto such person and persons, &c. as she shall think fit, and in default of such gift, &c. to stand possessed thereof for the sole use and benefit of my said daughter, her heirs and assigns for ever."

1819.  
MATTHEWS  
v.  
PAUL.

By another codicil, dated the 20th of *June*, 1804, the testatrix, after stating, that she had, since the making of her will, become entitled to a share and interest in the 5 per cent. Navy Annuities, gave the same 5 per cent. Navy Annuities, and all such other share and interest as she should have therein at the time of her decease, unto the same trustees, upon the same trusts as were by her said will declared concerning her share and interest in the 5 per cent. Loyalty and Imperial Terminable Annuities in her will mentioned, and to transfer the same accordingly.

The testatrix died in *December* 1805. At her death, her daughter, Mrs. *Paul*, had five children, who were all then infants, viz. two sons, *John* and *Walter Matthews Paul*, and three daughters, *Mary*, now the wife of *M. B. Napier, Ann*, and *Harriet Paul*. *John Paul*, the eldest son, died without issue, in *December* 1817, having attained the age of twenty-one. *Walter Matthews Paul*, the second son, attained the age of twenty-one in *February* 1818. The term for payment of the Imperial Annuities, expired on the 1st of *May*, 1819.

The bill was filed by the trustees of the will, for the purpose of having the trusts carried into execution, and the rights of all parties ascertained. The defendant, *Walter Matthews Paul*, by his answer, insisted that the intention of the testatrix was only to exclude *John Paul*, the eldest son, from taking any share of the stock, inasmuch as he was



1819.  
 MATTHEWS  
 v.  
 PAUL.

amply provided for at the date of the will and codicils, by having had considerable real estates entailed upon him under the will of his paternal uncle; and that it never was the intention of the testatrix to exclude the defendant, *Walter Matthews Paul*, from a share of the stock, by reason that he was not so provided for, and which the testatrix well knew at the time of making her will and codicils, and for other reasons apparent on the will and codicils. The other defendants insisted, that the intention of the testatrix was to exclude from a share of the stock, not only *John Paul*, the eldest son, but also any son of her daughter who should become an eldest son previous to his attaining twenty-one years, and thereby obtaining a vested interest in a proportionate share of the stock. It was admitted at the bar, that *John Paul*, the eldest son, was tenant in tail of a considerable estate; but that on his death, *Walter Matthews Paul* did not become entitled to it, *John Paul* having, on his attaining the age of twenty-one, suffered a recovery, and devised the estate to his father in fee.

Mr. Agar and Mr. Rose for the defendant, *Walter Matthews Paul*, contended, that being an only and not an eldest son, he was not excluded by the terms of the will from a share of the funds, and that it could not be the intention of the testatrix to exclude him, the term "eldest son" having been held, in many cases, to signify the son who is entitled to the family estate, and a similar reason having induced the Courts to hold a daughter entitled to a share of a pecuniary provision, under the description of a younger child, though she was elder than the person entitled to the estate. And they referred to *Beale v. Beale* (a), *Trafford v. Ashton* (b), *Heneage v. Hunloke* (c), *Graham v. Lord Londonderry* (d),

(a) 1 P. W. 244.

(b) 2 Vern. 660.

(c) 2 Atk. 456.

(d) Cited in *Lord Tryham v. Webb*, 2 Ves. 199.

Lord Hardwicke's observations in *Lord Teynham v. Webb* (a), *Duke v. Doidge* (b), *Driver v. Frank* (c). If in the present case, *Walter Matthews Paul* is to be excluded from a share of this fund, he may be left entirely without a provision; for it is admitted, that the family estate to which his elder brother was entitled, has been devised by him to his father in fee, and may be sold or devised to a stranger. The decision of Lord Hardwicke in *Lord Teynham v. Webb*, will probably be referred to on the other side; but it is distinguishable from the present case by the circumstance that Lord Teynham, who there claimed the portion, had succeeded to the title and estate of the family; and there also appeared to have been an acquiescence by him in the claim of his sister to the whole fund. In *Hall v. Hewer* (d), Lord Hardwicke said, that there was no case where the Court had considered a younger child as an eldest, but between parents and children, or those who stand *in loco parentis*. The testatrix in this case cannot be considered as having been *in loco parentis* to the children of Mrs. Paul; she was their grandmother, and their parents are both living. *Walter Matthews Paul* was a younger son at the date of the will, and in that character acquired a vested interest in the funds in question, according to the established rule, that where payment of a legacy is postponed on account of circumstances affecting the fund, it is vested immediately.

1819.  
MATTHEWS  
v.  
PAUL.

Mr. Wilbraham, for Ann and Harriet Paul, Mr. Hart and Mr. Isaac Lloyd Williams for Mr. and Mrs. Napier and their children, and the trustees in their marriage settlement, contended, that the present case was within the rule laid down by Lord Keeper Wright in *Chadwick v. Doleman* (e), where a sum being directed to be raised out of lands

(a) 2 Ves. 198.

(b) 2 Ves. 203, note.

(c) 3 Maule and Selw. 25.

(d) Amb. 203.

(e) 2 Vern. 528.

for

1819.  
 MATTHEWS  
 v.  
 PAUL.

for younger children's portions, in such shares as the father should appoint, an appointment to a second son, who afterwards became an eldest, was held to be defeasible, from the capacity of the person; "that he was a person capable to take at the time of the appointment made, but that was *sub modo*, and upon a tacit or implied condition, that he should not afterwards happen to become the eldest son and heir, so that he had as it were only a defeasible capacity in him." And they referred also to *Lord Teynham v. Webb* (a), and *Savage v. Carroll* (b). It cannot be supposed that the testatrix meant to confine the term "eldest son" to the person who should for the time being succeed to the estate which belonged to *John Paul*; for there is no estate settled, a circumstance which distinguishes this case from all those referred to in the argument on the other side, in which the party was acting under a family settlement, and dealing with family property. Here the construction must be the same as if the testatrix was a total stranger; she was under no moral or legal obligation to provide for these children; nor, supposing her to be acquainted with the state of the family, can that make any difference, according to *Godfrey v. Davis* (c), and *Radcliffe v. Buckley* (d). It cannot be assumed that *Walter Matthews Paul* is without provision, though he does not succeed to his brother's estate; for as there is an estate in the head of the family, it is not to be taken for granted that he will not be provided for. The codicil to this very will makes provision for *Walter Matthews Paul*. The amount of the provision was held, in *Cook v. Arnham* (e), to be immaterial. This case is distinguished from those referred to on the other side by the circumstance that in all those cases the gift was to persons not in existence, and who were to be ascertained merely by their answering a particular description. It is evident that

(a) 2 Ves. 198.

(b) 1 Ball and Beatty, 265.

(c) 6 Ves. 43.

(d) 10 Ves. 195.

(e) 3 P. W. 283.

the testatrix knew that she had an eldest grandson; for in another clause of the will, she describes *W. M. Paul* as her daughter's second son. If she had meant the words of exclusion to apply merely to the then eldest son of her daughter, she would either have described him by name, or as "*the*," and not "*an*," which is synonymous with "*any*," eldest son. She meant the person to be excluded to be left undetermined till the period of division. Nor did she mean entirely and under all circumstances to exclude an eldest; for in one event it is given to an eldest or only child. In *Duke v. Doidge* (a), there was an evident intention to provide for all the children; and the parent having appointed the estate to a younger son, the eldest was held entitled to a portion. The word "*younger*" occurred but once, and the Court was under the necessity of rejecting it, to give effect to the other provisions of the settlement.

*Mr. Whitmarsh*, for the executors, submitted to act as the Court should direct.

*The MASTER of the ROLLS.* In this case it is contended, on behalf of the defendant *Walter Matthews Paul*, that although he is now become the only son of his mother, yet having been a younger son at the date of the will, and at the death of the testatrix, he is entitled to a fourth share of the funds in question. On the other hand, it is insisted, that in the event which has happened, *Walter Matthews Paul* having, by the death of his brother, become the only son of his mother, is, on the true construction of the will, to be excluded from a participation in the fund. The Imperial Annuities and the interest were by the will directed to be transferred at the expiration of the term for the ending of the Imperial Annuities, which arrived in *May* last; and the trustees were, according to the language of the will,

1819.

~  
MATTHEWS  
v.  
PAUL

July 26.

(a) 2 Ves. 202, note.

"thereupon

1819.

~  
MATTHEWS  
v.  
PAUL.

"thereupon to assign and transfer all such stocks or funds, as well original as accumulated, unto and among all and every the children of *Mary Paul*, if more than one (except an eldest son), share and share alike." This is an express direction, that the assignment to be then made is to be in exclusion of whatever person should sustain the character of an eldest son. It is observable, that it is a division of personal property to take place at future periods, part of the funds being divisible at the death of the surviving tenant for life, and the other at the expiration of the *Terminable Bank Annuities*, which happened fourteen years after the date of the will. It was a prospective direction for a division, and it is a direct order to transfer to all the children, but with an exclusion of an eldest son. The only thing to be determined is the period of time at which the description "eldest son" is to be considered as applying, it being capable of being altered by circumstances, and there being no identification by name either of the persons to take or to be excluded. The takers are to be children of the daughter of the testatrix, and the person excluded is to be a person sustaining the character of her eldest son, not fixing *nominatim*, but by character, either the person to take or to be excluded. The only question then is, at what period of time the character is to be fixed. It can be only at one of these three periods—the date of the will, the death of the testatrix, or the period at which the fund is directed to be assigned. Without advertg to the numerous cases which have been referred to, all which I have read and attended to, the few plain principles deducible from them will enable us to fix the period to which the words are to be applied. The fact is indisputable, that *Walter Matthews Paul* is now the eldest, and that he was once not so. On principle, let us first consider whether the description can apply to the time at which the will was made. If that were the intention, the exclusion was meant to be penal to an existing individual; for the testatrix was well acquainted with the state of her daughter's family.

family. The codicil gives an estate to *Walter Matthews Paul* by name, describing him as the second son. She knew therefore that he was the second son, and had an elder brother. If she intended a personal exclusion only of *John*, the then eldest son, there was no reason for not identifying and excepting him by name. But she has not only omitted to do this, but she has not even used the words "*the* eldest son," which would have been more descriptive of an individual; she seems to have purposely adopted expressions which have a general application; for, in introducing the person to be excepted, she constantly makes use of the indefinite article, anxiously marking her intention not to exclude an individual by name, but whatever person might sustain the character of an eldest at some period to which she looked forward. In the same manner she describes the children of her daughter, not by name, but by character; not knowing what number there might be: and the fund was not to be distributed in the one case till the death of the father and mother, nor in the other till the expiration of the annuities. She evidently looked forward to events which might change both the number of the children, and the relation of eldest and youngest. When she adopts this indefinite expression, it has a strong tendency to shew that she did not mean to exclude any individual, but the person who should sustain the particular excepted character. It is impossible to say that the words are not future in their import; and I cannot conceive that she meant to exclude merely the person who was eldest son at the time when she made her will. In the very same codicil which describes *Walter Matthews Paul* as the second son, she disposes of the property, in case of his death, to the sons, except an eldest son; so that if *Walter Matthews Paul* should die before he attained the age of twenty-one, there might be the same exclusion of an eldest son in that event. It is clear that she looked to a future state of things. The disposition was not confined to children who were then in being; for, as the fund was to be distributed

1819.  
  
 MATTHEWS  
 v.  
 PAUL.

at

1819.

~  
 MATTHEWS  
 v.  
 PAUL.

at a certain period, every child living at that period would be entitled to take under the description. She does not speak of persons who are to be in case at the time when the will is made; the persons who are to take, and those who are to be excluded, are to be ascertained by future events.

But secondly, it is contended, that the interests of the children vested at the death of the testatrix, and that her intention was to exclude only the person who should be the eldest son at that period. That the shares having become vested at that time in all the children, except an eldest son, and *Walter Matthews Paul* having been then a younger son, his share became vested in him, and was not liable to be divested by subsequent events. This question depends on the true construction of the words in the latter clause of the will, referring to the former clause as to the vesting, and by which she has declared that the interests given to the children shall be vested interests, and transferable at their ages of twenty-one years. This gives the true meaning of the declaration of the testatrix as to the period of vesting. One construction is, to make the sentence as to the vested interests distinct from that which directs the shares to be transferable at the ages of twenty-one years. The other is to consider it as one entire sentence. It is necessary to look at the context, to ascertain whether the period of twenty-one is meant to apply to both periods, or only to that at which the shares are to be transferable. It is said that the intention was, that they were all to take vested interests at the death of the testatrix, and that the shares of any children dying immediately afterwards should be transmissible to their representatives. But I think that such a construction would be in direct opposition to another part of the will, which directs that the share of a child dying under twenty-one shall go to his children. This shows that the share could not be antecedently vested in the parent; for it is positively given

-over

1819.

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MATTHEWS  
v.  
PAUL.

over on the death of a child under twenty-one to his children. It is further provided, that if the parent shall die under twenty-one without leaving any children, his share shall go to the surviving children. It could not therefore be vested in the parent. The testatrix goes on to provide, that in case her daughter shall leave no child at her decease, or leaving such, they shall all die under the age of twenty-one, without children, the trustees are to transfer the stock to such persons as her daughter shall appoint. It is clear, therefore, that without directly negating the words of the will, it could not be held to vest in a child not attaining the age of twenty-one, the bequests over expressly providing for every case. It is said that the interests must be considered vested, because it would otherwise be unnecessary to introduce a bequest over, the bequest over being inserted to prevent a child from making a testamentary disposition before the age of twenty-one. But it might be equally necessary to make a bequest over in case of no disposition by the parent. It is for the purpose of preserving it entire for the children, or the survivors of them, and to prevent it from falling into the residue. The bequest over is quite consistent. It was necessary to determine what should be done with the property. It was a necessary purpose requiring express clauses, and it is incompatible with the idea of its being actually vested. If the fair construction of the words "to be vested interests, and transferable at their, his, " or her ages or age of twenty-one years," were not sufficiently evident from the words themselves, the context puts it out of all doubt that the interests were not vested till the age of twenty-one.

This clearly disposes of the question as to the second period. What happened at the death of the testatrix to induce her to look at that as determining who was to be considered an elder or a younger son more than at the time when the will was made? Why should her death fix the period? The  
purpose



1819.

—  
MATTHEWS  
v.  
PAUL.

purpose of her mind was to confine her bounty to the children exclusive of an eldest son, that it should go to all but him; not to confine the exclusion to the person who should be eldest at her death, but the eldest is to be excluded when the others are to take. Whoever shall be the eldest son when the fund is to be assigned, is to have no benefit from her bounty. The Court is not at liberty to enquire into her reasons for this exclusion; she might probably be induced by an expectation that the eldest son would inherit some real property, but whatever her reasons were, they applied generally to the person who should be the eldest son at the time of the division. The context and intention of the will have positively fixed, that until twenty-one there was no vesting, that there was to be no division until the death of the parents as to one fund, nor until the expiration of the annuities as to the other. The exclusion was then to apply.

In all cases of future legacies to classes of persons, the general rule is, that those persons alone who come into *esse* before the period of distribution, are entitled to take. The Court cannot adopt a different construction with regard to an individual who is to be excluded. This rule being settled by a long train of authorities, the Court cannot fix on either the date of the will, or the death of the testatrix. In the present case the period is fixed beyond all doubt. The fund was to accumulate to the period at which the Terminable Annuities should cease. That was in *May 1819*, and that is the period to which we must look, for the purpose of ascertaining the persons who are to take, and the person who is to be excluded. *Walter Matthews Paul* was then an eldest son; to consider him as entitled would be to contradict the will; if he sustains the character of eldest son, the terms of the will expressly forbid the transfer of any share to him. It is unnecessary to enumerate all the cases on this subject, some of which have gone much further than the

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the present, as the case of *Chadwick v. Doleman* (a), where the appointment was to an individual by name, yet having become an eldest son, he was excluded, Lord Keeper *Wright* being of opinion, "that though the defendant at the time of the appointment was a person capable to take, and was a younger child within the power of appointment, yet that the appointment was defeasible not from any power of revoking or upon the words of the appointment, but from the capacity of the person. He was a person capable to take at the time of the appointment made, but that was *sub modo*, and upon a tacit or implied condition that he should not afterwards happen to become the eldest son and heir, so that he had as it were a defeasible capacity in him." In *Savage v. Carroll* (b), the same rule was recognized and acted on by Lord *Manners*. In *Lord Teynham v. Webb* (c), the case of *Chadwick v. Doleman* is recognized and commented on by Lord *Hardwicke*, who treats it as a very strong authority. And in *Hall v. Hewer* (d), where the testator directed that in the event of *John Hewer's* death without children, 6000*l.* should be secured "to the younger children of Mr. Hall," the question was, whether the plaintiff, originally the second, but who became the eldest son of *Hall* before the death of *John Hewer*, was entitled to a share of the 6000*l.*, and Lord *Hardwicke* held, that it did not vest till the death of *John Hewer*, and then in such persons as were at that time younger children of *Hall*. And the same rule was adhered to by the present Lord Chancellor, in the cases of *Lady Lincoln v. Pelham* (e), and *Bowles v. Bowles* (f).

I am therefore of opinion, first on the general ground, that the testatrix looked forward to a future class of persons to take and to be excluded, and that *Walter Matthews Paul*

1819.

MATTHEWS  
v.  
PAUL.

(a) 2 Vern. 528.

(b) 1 Ball and Beatty, 265.

(c) 3 Ves. 198.

(d) Amb. 203.

(e) 10 Ves. 166.

(f) 10 Ves. 177.

answered

1819.

~  
 MATTHEWS  
 v.  
 PAUL.

answered the description of an eldest son at the period of distribution, that he cannot be held entitled to a share of the fund, without directly contradicting the language of the will: Secondly, that if the words of the will had been more favourable to a vested interest in him, yet, having had the character of an eldest son fastened on him, it would be violating the tacit condition annexed to the gift to him, to hold that *he* is entitled. It has been said that cases may be put in which great hardship may arise from such a construction, and that the second son may be entirely excluded from a provision; undoubtedly he may; but cases of an opposite nature may also be put. An eldest son may by gift or devise make his brother the head and heir of the family; possible cases of hardship may be imagined which ever way the question is decided, but they cannot operate on the judgment of the Court, which must be founded on the settled rules of construction, and the intention of the testatrix. This is on the whole one of the strongest cases which have occurred in favour of the exclusion of the second son who is now become the eldest.

“ Declare that on the true construction of the will and  
 “ codicil, the defendant *Walker Matthews Paul* is not en-  
 “ titled to any part of the 7000*l.* Bank Stock, and 4300*l.*  
 “ Navy, five *per cent.* Bank Annuities, and the five *per cent.*  
 “ Annuities, purchased with the dividends of the Imperial  
 “ Terminable Annuities.”

PALMER

1819.

PALMER v. CRAUFURD.

Rolls.  
July 2. 3. 18.

*JAMES Craufurd*, by his will dated the 31st of *January*, 1816, gave to *John Craufurd* and *Coutts Trotter*, the sum of 3000*l.* in Trust to be by them employed in purchasing in their names upon the life of his brother *George Craufurd*, an annuity in the Government Life Annuities of the value of 3000*l.* to be by them received and paid to him in equal shares every six months during his life, upon condition of his renouncing in writing within eight days after receiving the notification of the testator's death, all demands and claims whatever upon the testator's estate, or upon any property or estate of which he might die possessed; failing of which the disposition in his favour to be null and void: and he left out of his remaining property to *John Craufurd* and *Coutts Trotter*, the sum of 2000*l.*, In Trust to be by them employed in purchasing in their names, and on the life of his brother *George Craufurd*, an annuity in the Government Life Annuities of the value of the said 2000*l.* to be received and paid by them to *George Craufurd*, in equal shares every six months; *John Craufurd* and *Coutts Trotter*, being thereby authorized if they thought it necessary, and for the advantage of *George Craufurd*, to dispose of the said 2000*l.* for his benefit, and with his consent, in any other manner which might appear to them most eligible; the whole upon condition only of his renouncing in writing within eight days

Bequest of 3000*l.* to trustees, in trust, to be by them employed in purchasing in their names upon the life of G. an annuity in the Government Life Annuities of the value of 3000*l.* to be paid to him every six months during his life:—

Under this clause G. is entitled to have the 3000*l.* paid to him absolutely.

The testator was in the habit of allowing to G. who resided in *Holland*, an annuity of 3200 Guilders, (amounting to 300*l.*) and after the date of his will, he by letter directed his agents there to continue the annuity till his executors should have arranged his

affairs, and he left a written paper to the same effect. G. survived the testator three years, and during that time received the annuity of 3200 Guilders, from the agents in *Holland*, but no government life annuity was ever purchased, G. being unable to come to *England* to attend at the annuity office:—

Held, that G.'s representatives were entitled to the 3000*l.* deducting the money paid to G. by the agents in *Holland*.

after

1819.  
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 PALMER  
 v.  
 CRAUFURD.

after receiving the notification of the testator's death, all demands and claims whatever on his estate, or upon any property or estate of which he might die possessed; failing of which this disposition in his favour as well as the preceding one of 3000*l.* to be null and void, it being also understood that this sum of 2000*l.* should not be called for in any way before the expiration of one year after the testator's death. The testator appointed *John Craufurd* (the defendant) and other persons executors, but *John Craufurd* alone proved the will.

The testator, during several years immediately preceding his death, had been in the habit of allowing to his brother *George Craufurd*, who resided in *Holland*, an annuity of 3200 Guilders, equal to about 300*l.* sterling. On the 9th of *February*, 1816, the testator, who resided in *London*, wrote to Messrs. *Ferrier* and *Co.* his agents at *Rotterdam*, a letter of that date in the following words:—"I have hereby  
 " to request and authorize you to continue to pay to my brother Mr. *George Craufurd* for my account, the sum of  
 " 3200 Guilders *per annum*, in equal quarterly payments, in  
 " the event of my death, till such time as my executors shall  
 " have arranged my affairs, should they require some time for  
 " that purpose, and this letter will be your authority with  
 " them, which will be confirmed to them by me: and you will  
 " observe that your Mr. *Ferrier* will have funds of mine out  
 " of which the said payments to my brother will be found." The testator also left in his own hand-writing the following paper, without date:—"In order to provide for my brother's  
 " subsistence upon my death, before my executors may be  
 " enabled to make the necessary arrangements, I shall authorize Messrs. *Ferrier* and *Co.* to continue to advance to  
 " him the same sum of 3200 Guilders *per annum*, which  
 " he now receives, and that so long after my death till my  
 " executors shall declare themselves ready to carry into  
 " effect

“ effect the clause in my will respecting my brother, and I  
 “ shall further authorize Messrs. *Ferrier* and Co. to pay  
 “ themselves such advances out of the money due to me  
 “ by Mr. *Alexander Ferrier*; provided always, before mak-  
 “ ing any payments after my death, my brother comply with  
 “ the stipulation concerning him contained in my will, which  
 “ compliance or non-compliance will of course be com-  
 “ municated to Mr. *Ferrier*; by this manner of preventing  
 “ my brother from suffering any inconvenience by my death,  
 “ my executors will be the better enabled to make arrange-  
 “ ments with the other legatees, and they are reminded, that  
 “ there are three years, namely, 1813, 14, and 15, of profits  
 “ on the mines still to account for.”

1819.  
 PALMER  
 v.  
 CRAUFURD.

Neither the letter to Messrs. *Ferrier*, nor the paper last mentioned, were proved as testamentary.

The testator died on the 16th of *February*, 1816. *George Craufurd*, within eight days after that event was communicated to him, executed a release as prescribed by the will. The 3000*l.* was never invested in the purchase of a Government Life Annuity, *George Craufurd*, who resided in *Holland*, having been prevented by ill health and other obstacles from coming to *England* to the Government Annuity Office, where his personal appearance was absolutely necessary before the investment could be made; but the executor was for some time previous to *George Craufurd's* death, prepared to make the investment. *George Craufurd* died on the 4th of *February*, 1819, having from the time of the testator's death, and until his own, received from Messrs. *Ferrier* and Co. out of funds in *Holland* belonging to the testator, pursuant to the letter of the 9th of *February*, 1816, the annuity of 3200 Guilders, the payments of which during that period amounted to 1050*l.* sterling.

1819.

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PALMER  
v.  
CRAUFURD.

The bill was filed by the executors of *George Craufurd*, against the executor of the testator *James Craufurd*, for payment of the legacy of 3000*l*.

*Mr. Heald* and *Mr. Winthrop* for the plaintiffs, referred to *Barnes v. Rowley* (a), and *Bayley v. Bishop* (b), as establishing the rule, that under a gift of a sum of money to be invested in the purchase of an annuity to be paid to a person for life, the annuitant is entitled to have the sum paid to him instead of being invested. It is a gift to him of the whole benefit of the annuity, with a direction merely as to the manner of payment. The sum was entirely severed from the testator's property, and cannot be again united to it. The annuitant acquired an immediate vested interest to have the money laid out for his own benefit. It differs from a gift of money to be laid out in stock, or at interest, with a direction to pay the dividends to a person for life. In the present case there is the additional circumstance, that a condition is imposed on the annuitant of releasing the testator's property, which makes him to a certain extent a purchaser. The question is, whether any subsequent act defeated the interest thus vested. The letter and the paper of instructions cannot vary the case. The question depends entirely on the construction of the will, and cannot be altered by those documents, which the Court cannot indeed look at, as they are not proved as testamentary. It is admitted that the annuity of 3200 Guilders was paid, and that the annuitant derived a benefit from the testator's assets, at least equal in value to any annuity which might have been purchased. But if *George Craufurd* had received it for twenty years, he might have insisted on the purchase of a Government Annuity whenever he thought proper to require it. The letters are only for the purpose of securing him a temporary provision till the annuity should be purchased. They have a tendency to confirm rather than to revoke the bequest.

(a) 3 Ves. 305.

(b) 9 Ves. 6.

Mr.

Mr. Hart and Mr. *Martin West*, for the defendant. In the cases referred to it does not appear that there was an intermediate provision for the annuitant until the period of investment; and that distinguishes them from the present. If your Honour does not consider yourself competent to look at the letters, you will afford the defendant an opportunity of propounding them to the Ecclesiastical Court for probate. The distinction apparent on the will itself between the legacies of 3000*l.* and 2000*l.* shews that the testator did not intend the latter to be a gift of a sum in solido. The 3000*l.* is directed to be invested in a Government Life Annuity, and there is a similar direction as to the 2000*l.*; but it is further provided, that the latter may be applied in any other manner for the advantage of the annuitant, with his consent. It is evident that the testator did not mean to give a similar option with respect to the 3000*l.*, but that as to that sum the direction for investment was to be imperative. The non-investment was not occasioned by any act or default of the defendant; it was in consequence of the annuitant's residence in *Holland*, and his inability to attend at the office. *George Craufurd* could not have required the 3000*l.* to be paid to him, and his representatives cannot be in a better situation than himself.

1819.  
PALMER  
v.  
CRAUFURD.

*The MASTER of the ROLLS.* It is not disputed that the plaintiff as the personal representative of *George Craufurd*, is entitled to the residue unpaid of the legacy of 2000*l.*, for that legacy is expressly directed to be applied in any manner for the benefit of the legatee. The legacy of 3000*l.* is differently circumstanced, for the executors had no option given to them, but were expressly authorised to invest it in the purchase of a Government Life Annuity, and to pay it half yearly to *George Craufurd*. It is admitted that no such investment was made, because *George Craufurd* could not come and present himself in person at the Annuity Office; and that instead of a Government Life Annuity, the

July 16.



1819.

PALMER

v.

CRAUFURD.

provision directed by the testator's letter was continued to him till his death; that the payments made on that account amount to 1050*l.* and that he died without having had any annuity actually purchased. The plaintiff, his executor, insists that he is entitled to the 3000*l.* deducting the sums he received. The cases of *Bayley v. Bishop* (a), *Yates v. Compton* (b), and *Barnes v. Rowley* (c), have clearly established, that where a legacy is given to be laid out in the purchase of an annuity, though the legatee dies before it is actually invested, or even as in *Bayley v. Bishop*, during the life of a person at whose death the fund is to be laid out, yet the interest is vested in the legatee at the testator's death, and the intended annuitant having survived the testator, may elect either to take the sum or to have it laid out in an annuity. If this case stood independent of the letter and instructions it could not be distinguished from those referred to, and the plaintiff would clearly be entitled to the legacy. The only peculiarity in the present case is occasioned by those two documents, and the conduct of the parties subsequent to the testator's death. It is to be observed, that the letter and the instructions were intended only as directions for a temporary provision till a given event, namely, until the executors should be ready to make the investment directed by the will; and it is admitted, that they were ready to do so before the death of the legatee, but that the legatee from his inability to attend personally was not ready to receive it; and that the temporary provision was for that reason continued. The question then is, whether that circumstance can divest the legacy, or whether the legatee, if now living, could now insist either on having it laid out in an annuity, or on having the sum actually paid to him. I am of opinion, that the only effect of the intermediate transactions was to reduce the legacy. The legatee has received 1050*l.*, and the question is, in what manner the legacy is to be reduced.

(a) 9 *Ves.* 6.(b) 2 *P. W.* 308.(c) 3 *Ves.* 305.

The

The way in which it strikes me is, that he must be considered as having elected to take the 3000*l.*; that interest must be computed on the legacy, and the 1050*l.* to be considered as so much received by him on account of principal and interest.

1819.  
PALMER  
v.  
CRAUFORD.

Ex parte SMALL,  
In the Matter of HALE.

July 17.

A COMMISSION of bankrupt issued against *Hale* by the description of a cattle dealer, without the words "dealer and chapman." On the trial of an action of trespass brought by the bankrupt, against the messenger and the assignees, evidence was offered of a trading by buying and selling hops. The evidence was objected to by the bankrupt's counsel as inadmissible on account of the description in the commission, but it was received by Mr. Justice *Park*, before whom the cause was tried, and a verdict was found for the defendants. On a motion for a new trial the Court of *Common Pleas* held that the evidence ought to have been rejected, and they granted a rule absolute for a new trial (a). There was evidence of a dealing in sheep, but it did not establish any other character than that of a drover. The defendants now presented a petition to the Lord Chancellor praying, that the words "dealer and chapman" may be inserted in the commission, or that it may be superseded and a new one issued, of the same date, with a proper description.

Where a commission of bankrupt issued against a person describing him as a cattle dealer, and on the trial of an action of trespass by the bankrupt, evidence was received of a dealing in hops, and a verdict found for the defendant, which verdict was set aside, and a new trial granted, on the ground that the evidence ought to have been rejected, the Lord Chancellor refused to insert the words "dealer and chapman" in the commission, or to supersede it, and grant another of the same date.

Mr. *Rose* in support of the petition, admitted that there was no instance of such a petition, but suggested that the

(a) *Hale v. Small*, 5 *Moore*, 53.

*Seemle*, however, that the evidence was admissible.  
Court

1819.

*Ex parte*  
SMALL.

Court might comply with the prayer for the purpose of enabling the parties to proceed to trial on the true questions between them, the trading, the act of bankruptcy, and the petitioning creditor's debt. The soundness of the decision of the Court of *Common Pleas* may well be questioned. In *Ex parte Herbert (b)*, the commission and the affidavit of the petitioning creditor's debt described the bankrupt as a waterman, and your Lordship was of opinion, that the general statement in the commission that the bankrupt got his living by buying and selling, was sufficient to support it.

Sir *Arthur Piggott* and Mr. *Cullen* opposed the petition as entirely without precedent. It is an application that the words "dealer and chapman" may be inserted in the commission, or that it may be superseded, and another issued of the same date; and this is asked for the express purpose of affecting proceedings at law, which have been had in consequence of the commission. If the judgment of the Court of *Common Pleas* cannot be supported, it must be corrected by the proper tribunal; but the Great Seal will never interfere for the purpose of affecting proceedings which have taken place at law under a commission.

*The LORD CHANCELLOR.* If the decision of the Court of *Common Pleas* be right, there are very many commissions of bankrupt which it would be impossible to support. Many commissions have been sustained here where the trading stated in the commission as part of the bankrupt's description is not proved, but where tradings of a different kind have been proved by affidavit. There have been many such cases. I recollect one in which a bankrupt was described in the commission as a dealer in cinders, and the commission was ultimately supported by evidence which established a trading in pigs. When a man brings an action in consequence of a commission issued against him, he

(b) 3 *Ves. & Bea.* 399.

admits that he is the person against whom the commission issued, and it is then immaterial what is the nature of the trading. I could not supersede this commission if an action might be brought for suing it out, without an agreement that the supersedeas should not affect the action. I must dismiss this petition, because I am of opinion, that if an action can be maintained, I have no right to affect the action. If the law be as it has been considered by the *Common Pleas*, the multitude of commissions which must be overturned, is absolutely frightful. If however the bankrupt be described by an addition which does not shew him to be a trader, I doubt whether the Great Seal ought to issue the commission. But I believe it will be found, that there is something like a rule in the office, that where a person is so described, there must be the words "dealer and chapman" in the petition.

1819.

Ex parte  
SMALL.

Petition dismissed.

The ATTORNEY-GENERAL v. JOHNSON, The  
Mayor, Commonalty, and Citizens of LONDON, and  
Earl GROSVENOR.

May 22.  
June 19. 23. 26.  
30.

THIS was an information filed on the 19th of May, 1819,  
by the Attorney-General at the relation of *W. R. Hodges*,

On the filing  
of an informa-  
tion by the  
Attorney-Ge-  
neral at the  
relation of

an individual, and a bill by the relator, the Lord Chancellor granted an injunction ex parte, on affidavits, to restrain a purpresture in the River Thames; and it appearing that there had been no previous writ of *ad quod damnum*, and that an indictment in the *King's Bench* was depending against the defendants for the same act, the Lord Chancellor refused to dissolve the injunction before the trial of the indictment, notwithstanding there were some affidavits on the part of the defendants, stating that the act complained of was beneficial to the navigation.

And it was held to be immaterial to whom the soil belonged, it not being competent either to the Crown or to a subject, to use it for any purpose amounting to a nuisance.

and

1819.  
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 The  
 ATTORNEY-  
 GENERAL  
 v.  
 JOHNSON.

and also a bill by the relator as plaintiff, stating, that on the East side, and in front of, and opposite to, a row of dwelling-houses called *Millbank Row, Westminster*, one of which houses was in the relator's occupation, who dwelt there with his family, there was, long before the month of *April* 1818, and had been ever since, up to the filing of the information and bill, a certain common public King's Highway called *Millbank Row*, for all persons on foot, and with horses, carts, and carriages to pass and repass; and on the East side of such highway there had been and was a wall and embankment of brick adjoining to and supporting the highway, and lying between the same and the ancient navigable River of *Thames*, and serving as a protection to persons passing on the highway, to secure them from falling into the river; upon which wall and embankment there had been and was a wooden rail or fence for the greater security of the persons, horses, and carriages passing and repassing along the highway; that the said River was, and from time immemorial had been, an ancient navigable river, and common King's Highway, for all persons with their ships, vessels, boats, and crafts, to pass, repass, and navigate at their free will and pleasure, and to moor their vessels in convenient parts of the river, not impeding the navigation thereof; that the defendant *Johnson*, about the 14th of *April*, 1818, employed several labourers in digging a considerable number of large and dangerous holes of great breadth and depth, in and upon the bed of the river, and close or near to the wall and embankment, and opposite to and in front of *Millbank Row*, and also pulling down, undermining, and destroying certain considerable parts of the wall and embankment, and rail; and that in consequence of such proceedings a considerable part of the wall and embankment was actually destroyed and fell down, and that thereby the highway was immediately rendered very inconvenient and dangerous; and that the persons so employed by the defendant *Johnson*, carried off and removed divers large quantities of bricks and other materials, and rubbish, of which

which the wall and embankment had been composed; that the Relator on the 14th of *April*, 1818, requested the persons so employed, and especially *George Tatton*, who superintended the said proceedings on behalf of the defendant *Johnson*, to desist from such their proceedings, which *Tatton* declined to do, and ordered the other persons to proceed, assuring them that the defendant *Johnson* would protect them, and at the same time declared that *Johnson* was intending there to erect and run out wharfs into the river, or to that effect, and that the persons so employed did continue such their proceedings accordingly; and the relator soon afterwards was informed by one *Harris*, an agent of *Johnson*, that *Johnson* had obtained a grant or pretended grant of the said ground opposite to the said row of dwelling-houses, and of a part of the bed of the river there adjoining, from or under the defendant *Earl Grosvenor*, (who was the owner and proprietor of the said row of dwelling-houses) and the defendants the Corporation of *London*, and by virtue or under colour thereof was about to erect wharfs on the ground comprised in such grant or pretended grant, which wharfs were to extend forty feet into the river in front of and beyond the place where the wall and embankment had stood, and that *Harris* by *Johnson's* direction was about to employ forty or fifty persons in the said work. The information and bill further stated, that thereupon and on the day after the relator had received such last-mentioned information, he caused to be left at *Johnson's* dwelling-house notice in writing, dated the 15th of *April*, 1818, that if he carted and threw into and upon the bed, stream, course, and waterway of that part of the River *Thames* and common King's Highway opposite *Millbank Row*, any bricks, &c. with intent to erect any mound, wharf, and embankment thereon, an indictment would be preferred against him for a nuisance without any further notice. That *Johnson* having notwithstanding such notice continued his proceedings, and having also caused a large quantity of bricks and rubbish to be placed

1819.

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The  
ATTORNEY-  
GENERAL  
v.  
JOHNSON.

1819.

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The  
ATTORNEY-  
GENERAL  
v.  
JOHNSON.

placed on the bed of the River as a foundation for the proposed wharfs, and by which the River was considerably choaked up and narrowed, the Relator preferred a bill of indictment in the Court of *King's Bench*, on the 2d of *May*, in the same year, before the Grand Jury for the county of *Middlesex*, against *Johnson* and *Tatton*, charging them with a nuisance in digging the holes, undermining, and destroying the wall and embankment, and obstructing and choaking up the River, which bill was found a true bill; and that thereupon the usual recognizances were entered into by the defendants to plead to the indictment in the following *Trinity Term*, and to proceed to trial at the Sittings after that Term. That before any further proceedings were had on the indictment, the wall, embankment, and rail were restored, the holes filled up, and the other damages in a great measure repaired by the defendant *Johnson*; and it was intimated to the relator that the defendant would desist from such proceedings if the indictment were not proceeded in, whereupon the relator relying on such engagement and undertaking of the defendant *Johnson*, did not further proceed therein.

The information and bill further stated, that on the 11th of *May* instant, *Johnson* recommenced his proceedings, and had again removed a portion of the wall and embankment, and rail, and had placed an additional quantity of rubbish on the bed of the river, and was at the filing of the information, proceeding in the manner before-mentioned to remove a further part of the wall, embankment, and rail, and to build a wharf or wharfs on the scite aforesaid, and by such erections and proceedings, especially if the same should as was intended be carried on considerably further, the river was and would be for a considerable space narrowed by the breadth of forty feet and upwards, and the navigation of the river, and especially the mooring of vessels on the river side as had of right been accustomed to be done, thereby seriously obstructed; and vessels instead of being moored in convenient places near the shore, must be moored in the middle of the river,

river, to the great hindrance of navigation; and further, that the road and highway along *Millbank Row*, not only would be by the erection of the wharfs impeded and obstructed, but that in the mean time the same was and would continue to be in a very dangerous state, and for want of the protection of the wall and embankment which the defendant *Johnson* was proceeding, and threatened to proceed further to demolish, persons passing to and fro along the road would be exposed to serious danger, and liable to fall into the river, especially in the night time. That the relator immediately on discovering that the defendant *Johnson* had recommenced such his unlawful proceedings, without delay caused fresh notice of trial to be served upon the defendants, but that the same being to be tried by a special jury, there was great danger and probability that the same might and would unavoidably or by the contrivance of the defendants be delayed, and not come on for some considerable time yet to come, in which interval the defendant *Johnson* would complete his proposed works and proceedings, unless he should be restrained by injunction.

The information and bill further charged, that the proceedings of the defendant *Johnson* were and threatened to be a common Nuisance and detriment, and likely to be attended with much danger and inconvenience to his Majesty's liege subjects in general, more especially, if, as was intended, the same should be carried much further, and particularly to the Relator and other persons residing in *Millbank Row*; and that the Relator had frequently requested the defendant *Johnson* to desist from committing such nuisances and other unjust proceedings; but that he, acting in concert with the other defendants *Earl Grosvenor*, and the Mayor, Commonalty, and Citizens of *London*, who severally claimed an interest in the ground upon which the wharf was about to be erected, and in fact had authorized, and did aid and abet the proceedings of the defendant *Johnson*, had refused to comply with the relator's requests.

1819.

The  
ATTORNEY-  
GENERAL  
v.  
JOHNSON.

The



1819.

The  
ATTORNEY-  
GENERAL  
v.  
JOHNSON.

The information and bill further charged, that the Mayor, Commonalty, and Citizens of *London*, or the Mayor for the time being, were by virtue of divers acts of parliament, and also by prescription, or other lawful ways and means, the Conservators of the River *Thames*, and as such had jurisdiction over, and were bound by law to conserve and preserve the said river, and the navigation and shores thereof, and all mounds and embankments thereof, and to prevent any obstruction thereto and encroachments thereon; but that the said Mayor, &c. had lately set up and claimed a right or interest to or in the soil and bed of the river, and to make grants thereof for the purposes of erecting wharfs and other buildings, or licenses for such erections or buildings, and under colour thereof had made some lease or pretended lease to the defendant *Earl Grosvenor*, who had made an under-lease to the defendant *Johnson*; or the Corporation had made such lease to him of the soil or ground forming part of the bed of the river which the defendant *Johnson* was obstructing as aforesaid, and upon which he proposed to erect the wharfs; and that such proceedings were carrying on by him with the privity and by the authority of the Mayor, Commonalty, and Citizens, and of *Earl Grosvenor*; and that a premium of 300*l.* or other considerable premium had been actually paid to the Corporation for leave to erect the wharf; and moreover, that a considerable yearly rent was reserved and made payable by the defendant *Johnson*, in respect thereof, in which rent both *Earl Grosvenor* and the Corporation had an interest; and that the Corporation in fact intended to make similar grants, leases, or licenses for the erection of wharfs and buildings on other parts of the river, and thereby to make large profits, to the injury of His Majesty's subjects in general, navigating on and using the shores of the river; and that by reason of the circumstances before mentioned, it became very difficult to try the right to make the said erections, or to prevent the said illegal proceedings, which it was in fact the peculiar province and duty of the Mayor,

Mayor, Commonalty, and Citizens, or of the Mayor as such Conservators or Conservator to prevent: and especially that by an act of the 27th of King *Henry* 8. the removing of boards, stakes, piles, timber work, or other thing from the banks or walls of the River *Thames*, except to amend and repair the same, was made punishable; and which act it was the duty of the Mayor, Commonalty, and Citizens to enforce.

The information and bill further charged, that Earl *Grosvenor* not only insisted that he was entitled as such lessee to the said soil and bed of the river, but also claimed the ground or some part of the ground lying between the river and the adjoining row of houses, and the wall, embankment, and rail; and had made a lease thereof to the defendant *Johnson*, the information and bill charging that the soil and freehold of the said bed of the river, and of the ground adjoining thereto, (that is, so far in breadth from the river as the road and highway extends) were public property, and vested in His Majesty, and that any erection or building thereon would be a nuisance: and as evidence that Earl *Grosvenor* was not the proprietor of the soil or ground, it was further charged, that the expence of repairing the wall, embankment, and rail, and of the road, was not borne by the Earl, but by the Surveyor of the Highways of the Parish of *St. John the Evangelist*: that in case the Earl had any right to the said soil or any part thereof, his empowering the defendant *Johnson* to obstruct and narrow the road, and erect the wharfs, was a fraud upon the relator and other the tenants of the houses in *Millbank Row*, the leases of which had been taken with an understanding that the said row of houses should remain open to the river, and that the road in front thereof should not be obstructed, nor the wharf in front of the demised premises used for any other purpose than for landing fuel for the use of the demised premises.

The information and bill prayed a perpetual injunction to restrain all the defendants from obstructing and choking up the bed of the river, opposite and near to *Millbank Row*,

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1819.  
The  
ATTORNEY-  
GENERAL  
v.  
JOHNSON.

1819.

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The  
ATTORNEY-  
GENERAL  
v.  
JOHNSON.

or elsewhere; and from obstructing, narrowing, and impairing the said road, and removing the said wall, embankment, and rail-fence adjoining thereto, and from erecting or continuing to erect wharfs or any other buildings on the *East* side of and facing the said row of dwelling-houses, and between the same and the River *Thames*, or on the bed thereof, or on other parts of the bed of the said river; or that the defendants, and especially the defendant *Johnson*, might be so restrained until the trial of the indictment, or until some trial should be had under the direction of *this Court*, for ascertaining whether the defendants, or any of them, were entitled to take such proceedings, or any of them; and that proper directions might be given, if necessary, for ascertaining the rights respecting such matters, and at all events that the defendant *Johnson* might be restrained from building or erecting on the aforesaid scite any wharf, building, or receptacle for the reception of offensive or unwholesome matters, or for bringing or placing any such offensive matters to and on the same.

On the 21st of *May*, 1819, a motion was made before the Vice-Chancellor for an injunction, on the filing of the information and bill, and on an affidavit of the relator verifying the material facts stated in the information and bill; and also on affidavits of several watermen and others, who had for many years been acquainted with the River *Thames* opposite *Millbank Row*, stating that opposite to the dwelling-houses in *Millbank Row*, from a place called *Grosvener Wharf*, at the south end, to the Horse Ferry at the North end, being a distance of one hundred and twenty yards, the river forms a recess or bay, in which the deponents and divers watermen, lightermen, and other persons the owners of boats, barges, and craft on the river, have for many years past been in the habit of mooring their boats, &c. the same lying there in safety in boisterous and inclement weather, and without narrowing or impeding the navigation of the river: and that if the

the shore or bank of the *Thames*, opposite the dwelling-houses in *Millbank Row*, and the bed of the recess or bay should be filled up and built upon, the watermen and persons aforesaid would be obliged to moor their boats, &c. in the stream of the river, which would not only greatly impede the navigation, but would, especially in winter and in boisterous and stormy weather, be very dangerous and injurious to such watermen and persons, by the damage likely to be sustained by such their boats, barges, and other craft.

1819.  
The  
ATTORNEY-  
GENERAL  
v.  
JOHNSON.

It also appeared by the relator's affidavit that the defendant *Johnson*, in *Hilary Term* 1819, gave notice of trial of the indictment for the ensuing Sittings, but that it was made a *Remanet*.

The motion for the injunction having been refused by his Honour, was now renewed before the Lord Chancellor.

May 22.

*Mr. Wetherell*, *Mr. Wilson*, and *Mr. Tinney*, in support of the motion, referred to *The Attorney-General v. Cleaver*(a), as recognizing the jurisdiction of the Court in cases of nuisance, although in that case the Court did not think it right to interfere, partly because there had been laches in the relators, and partly on account of the inconvenience of stopping a large trading concern, in which capital to a great amount had been embarked. That was a nuisance of a much less general description than the present; it affected merely the inhabitants of a particular neighbourhood; this is the highest species of nuisance known to the law, a pre-emption in a navigable river, and affecting the whole community.

*The LORD CHANCELLOR.* I agree with what is represented to have been said by the Vice-Chancellor on hearing this motion, that injunctions granted *ex parte* on the filing of a bill and affidavit, have frequently been productive of

(a) 18 *Ves.* 211.

injury

1819.  
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 The  
 ATTORNEY-  
 GENERAL  
 v.  
 JOHNSON.

injury which it has afterwards been difficult to repair. But the Court can only proceed on the facts stated by affidavit, and if a case is made by affidavit entitling the party to the interference of the Court, and it should afterwards appear that the Court has been misled, the blame must attach not on the Court but on those by whom it has been thus mis-informed. The Court can only consider the circumstances, and attend to the balance of convenience. This is an information by the Attorney-General at the relation of an individual, and also a bill by the relator as plaintiff. The information is founded on the right of the Crown to authorise it's officer to come into a Court of Justice for the prevention of a purpresture on the River *Thames*, a species of nuisance affecting not merely individuals, but the public. Informations of this kind have been more frequent in the Court of *Exchequer* than in this Court. When I held the office of Attorney-General, I was engaged in some such cases, and there are many precedents shewing that you may proceed in that Court not for panishment but for prevention. This application is not rested singly on the ground of its being a nuisance, merely as affecting the rights of the King's subjects on the river, but it is also said, that wharfs are intended to be made on which offensive substances are to be deposited. On examination it will probably be found that *this spot has* hitherto been employed for similar purposes, and that the latter part of the grievance may on that account not deserve so much weight as appears to be attributed to it. In such a case, I know of but one rule by which the Court can govern itself, namely, by considering the nature of the act intended to be done, and the consequences of restraining it, or of permitting it to go on. The defendants in this case have given to the Court as reasonable ground to proceed on as could possibly have occurred, for it appears that twelve months ago they took the proper steps for procuring redress, by preferring a bill of indictment, on the finding of which the defendants applied for a stay of proceedings, and it was agreed

agreed that the prosecution should be carried no further. It appears to have so rested until *Hilary* Term last, when the defendants themselves gave notice of trial of the indictment, after which they recommenced their operations; and it appears probable that the indictment may be tried in a few days. This is a case in which the defendants if they are so advised, may demur, and the demurrer should be heard immediately. But if the information can be supported, what is the effect of the Court's now interfering by injunction? The matter in question may, as between the relator who is prosecutor, and the defendants, be tried in a few days from this time. If there should be a conviction on the indictment, there will be an end of the supposed right of the defendants to do the acts complained of by the information. On the other hand, if the indictment cannot be supported, the only mischief is, that the defendants, in consequence of the injunction, forbear to throw rubbish into the *Thames* during the very short interval between this time and the trial. In the one case they would be subject to all the difficulty and inconvenience of removing the rubbish, and in the other the Court merely treats that which the defendants are told is a great good, as being questionable. With great respect therefore for the opinion of the Vice-Chancellor, and although I agree with his Honour that there is sometimes much danger in granting injunctions on ex parte applications, I think, that under the circumstances, this is a fair case for granting an injunction in the first instance, until answer or further order; with liberty to the defendants to move to dissolve it on *Thursday* next, the Relator undertaking to give immediate notice to the defendants, of the injunction, and of the liberty given to them to apply to dissolve it.

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The relator afterwards filed a supplemental information and bill, bringing forward the fact, that another bill of indictment had been preferred, founded on the acts done by the defendants since the finding of the former, it being con-

1819.

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The  
ATTORNEY-  
GENERAL  
v.  
JOHNSON.  
June 19.

sidered that the trial of the former could not decide any question respecting those acts.

A motion was now made on behalf of the defendants to dissolve the injunction, on affidavits, stating that the erection of the proposed wharfs, and the narrowing of the river at the place in question, would be beneficial, instead of injurious to the current and navigation, as the impetus of the current would be increased; denying the utility of the bay or recess, referred to in the affidavits on the other side as a place of shelter for craft; and stating various instances of grants and licences from the Corporation of *London*, and the Court of Conservancy of the River for more than a century past to different persons, of liberty to enclose and embank parts of the soil of the *Thames* between high and low water-mark. The affidavits also referred to various passages in the charters of the City, and in grants to the City from the Crown, the language of which was supposed to be sufficient to comprehend the soil of the *Thames*. Additional affidavits were also filed on the part of the Relator in support of the statement in the information. It also appeared by affidavit that there was no intention to block up the carriage road mentioned in the information.

Mr. *Horne*, Mr. *A. Moore*, Mr. *Solicitor-General*, Mr. *Hart*, and Mr. *Treslove*, for the different defendants, in support of the motion, relied on the uninterrupted exercise by the Corporation of *London*, of the right of making grants of the soil of parts of the River between high and low water-mark, a right consequent either on their office of Conservator of the River, or of an ownership of the soil by themselves. Many of these grants have been made to persons in high official situations, in the Victualling and Ordnance Departments, and in some instances they have been granted for the purpose of being annexed to some of the Public Offices, and vested in trustees for the King. This  
shows

shews that the right of the City has never been disputed. The fines and rents accruing from such grants, are applied by the City towards improvements in the navigation of the River, and are not, as the information insinuates, appropriated by the Corporation to their own purposes. It is clear from a passage in Sir *Matthew Hale's* Treatise *De Portibus Maris* (a), c. 7. that the acts now complained of do not amount to a Nuisance. He enumerates among "Nuisances of Ports," "The straitening of the port by building too far into the water where ships or vessels might have formerly ridden;" but adds, "it is to be observed, that nuisance or not nuisance in such case is a question of fact. It is not therefore every building below the High Water-Mark, nor every building below the Low Water-Mark, is *ipso facto* in law a Nuisance. For that would destroy all the keys that are in all the Ports in *England*. For they are all built below the High Water-Mark; for otherwise vessels could not come at them to unlade; and some are built below the Low Water-Mark. And it would be impossible for the King to license the building of a new wharf or key, whereof there are a thousand instances, if *ipso facto* it were a common nuisance, because it straitens the Port, for the King cannot license a common Nuisance. Nay, in many cases it is an advantage to a port to keep in the sea water from diffusing at large; and the water may flow in shallows where it is impossible for vessels to ride. Indeed, where the soil is the King's, the building below the High Water-Mark is a purpresture, an incroachment and intrusion upon the King's soil, which he may either demolish or seize, or arrest at his pleasure; but it is not *ipso facto* a common nuisance, unless indeed it be a damage to the port and navigation. In the case therefore of building within the extent of a port in or near the water, whether it be a Nuisance or not, is *questio facti*, and to be deter-

1819.  
The  
ATTORNEY-  
GENERAL  
v.  
JOHNSON.

(a) 1 Hargr. Law Tracts, 85.



1819.

The  
ATTORNEY-  
GENERAL  
v.  
JOHNSON.

"mined by a jury upon evidence, and not *quæstio juris*." And they relied on the facts stated in the affidavits for the defendants, to shew that this was not a Nuisance.

Mr. Wetherell, Mr. G. Wilson, and Mr. Tinney, in support of the injunction, contended, that the right to the soil of the *Thames* was not in the Corporation of *London*, but in the Crown; and they observed that the passages in the charters and grants to the City which were supposed to give that Corporation a title, were to be confined either to *purprestures* then existing, or to the liberties of the City, which they insisted did not comprise the place now in question (a). And they referred to *Fitzwaller's Case* (b), and a case in the Court of Exchequer in *Easter Term*, 8 Car 1. (c), and 4 Inst. 249. in which Lord Coke, in treating of the Court of the Conservation the River *Thames*, states the authority of the Lord Mayor as applying to "the conservation and rule of "the water and river of the *Thames*, and the issues, breaches, "and lands overflown, &c. from the bridges of *Stanes*, unto "the water of *Yendall* and *Medwey*, and authority as touching punishment for using unlawful nets, and other unlawful "engines in fishing, and to all correction and punishment "there concerning unlawful nets and engines there," without any mention of a right to the soil of the River.

It is not competent to the Crown to make a *purpresture*, or to grant to a subject the right of making one. Every act of this kind must be authorised by a previous writ of *Ad quod damnum*. This appears clearly from *Hind v. Mansfield* (d). So far therefore as the grants from the Crown affect to confer any such privilege, they are inoperative, and no length of possession or exercise of such a supposed

(a) The Court having very early in the discussion intimated an opinion that it was not necessary for the purpose of the present question to determine in whom the right to the soil was vested, I have not inserted the learned and ingenious

arguments which were delivered on this point.

(b) 1 Mod. 106.

(c) *Hal. De Port. Mar.* 1 Hargr. Law Tracts, 13.

(d) *Noy*, 103.

right

right can constitute a title in the Corporation of *London* against the *jus publicum* of the country. It cannot be denied that the proposed alteration will destroy the mooring places of the craft; and if so, it is a nuisance although the stream may not be interrupted, for the stream is not the only part which is to be protected.

1819.  
 ~~~~~  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 JOHNSON.

*The* LORD CHANCELLOR, in the course of the argument, made the following observations:—I now understand that the road mentioned in the information, has been made a public highway; I therefore lay out of the case altogether what may or may not happen in point of nuisance with respect to the use of this public highway; for if no nuisance shall be committed, then it is unnecessary to consider it, and if there should be a nuisance, the Court cannot take notice of it until either the case happens, or something is done amounting to a threat. I am clearly of opinion that we have in this case nothing to do with any question respecting the title to the soil between high and low water-mark. This is not a record on which the Attorney-General is proceeding to assert the Crown's title, nor to pray for judgment on the part of the Crown, to recover possession by virtue of its title. I consider it to be quite immaterial whether the title to the soil between high and low water-mark be in the Crown, or in the City of *London*, or whether the City of *London* has the right of conservancy, operating as a check on an improper use of the soil, the title being in the Crown, or whether either Lord *Gravenor* or Mr. *Johnson* have any derivative title by grant from any one having the power to grant. This is a record calling upon me to prevent a nuisance; and if the Court has jurisdiction to prevent nuisances, it is a jurisdiction which may be exercised, whatever may be the title to the soil. It is my present opinion, that the Crown has not the right either itself to use its title to the soil between high and low water-mark as a nuisance, or to place upon that soil what will be a nuisance to the Crown's subjects. If the  
 Crown

1819.  
  
 The  
 ATTORNEY-  
 GENERAL  
 v.  
 JOHNSON.

Crown has not such a right, it could not give it to the City of *London*, nor could the City transfer it to any other person. The case therefore is reduced to two questions; first, whether the Court has jurisdiction to prevent something which may be a nuisance, but which is not yet completed; and secondly, whether the act now complained of is one of that description. In *The Attorney-General v. Cleaver* (a), if I recollect rightly, there had been considerable delay in making the application: and if the King's subjects have permitted the erection of a building which they were aware would, when completed, be a nuisance, without promptly applying to the Court to prevent it, the Court would not consider them entitled to the extraordinary assistance of a Court of Equity, but leave them to their legal remedy. But it is a different question whether the Court will interfere to prevent a nuisance threatened but not completed, and which, if permitted, may produce irremediable mischief, and whether the Court has not a jurisdiction to stop the progress of the intended work until it shall be ascertained whether it is a nuisance or not. I am inclined to think that the injunction in this case may well be continued for the present. The questions for consideration will be, first, as to the fact of nuisance, and secondly, whether there has been such delay in the proceedings on the part of those who seek to restrain it, as will prevent the Court from interposing, leaving them, as in other instances, to deal with it at law.

June 26.

*The LORD CHANCELLOR.*—At the time when I came first into this Court, whenever a cause was called on in which the Attorney-General was plaintiff, it was the constant practice for him to state that the cause should not go on unless under his own conduct in this Court. That practice continued through the successive periods when the office of Attorney-General was held by Lord *Thurlow* and Lord *Loughborough*. It has since been departed from, and the

(a) 18 Ves. 211.

consequence

consequence is, that in a case of this nature, the Court is sometimes put to a great difficulty in knowing how to act; for when the Attorney-General is a party upon the record, protecting the rights of all the King's subjects, how can the Court, without his sanction, be authorised to consider him as a mere nominal party? At present, therefore, I wish that Mr. Solicitor-General would be so good as to look at the record and affidavits, and tell me what he thinks is proper to be done on the part of the Crown, as interfering for the benefit of his Majesty's subjects, and whether it be in his opinion a nuisance or not; we shall then be able to arrive at a conclusion. I lay out of the case all the views in which it may be supposed that this embankment may either immediately, or in its consequences, occasion civil injury to any of these parties, or be in its consequences productive of other nuisances besides that which is complained of upon this record. I have already observed, that the title is entirely out of the question; for whether the soil between high and low water-mark is the King's, or has been granted by the Crown to the City of London, or whether a mere right of conservancy has been granted to the City, it is quite clear that it cannot be used as a nuisance to the King's subjects. Neither the Crown itself, nor its grantees, can use its title in that manner. I take it also to be clear, that *primâ facie* the subject has a right to use that which may be called a water-highway, and which *primâ facie* includes the water between high and low water-mark when it covers the soil; and that those who think proper to inclose that soil are *primâ facie* bound to shew that they can take it away without injury to His Majesty's subjects. There is another point to be considered, upon which at present I say nothing, except that it may be worth while to think more upon it; whether the law of this country does not require some previous enquiry whether an act may be rightly and properly done, which if it should be improperly done, would be a nuisance. There are many acts which the Crown may  
authorise

1819.

~  
The  
ATTORNEY-  
GENERAL  
v.  
JOHNSON.

1819.

The  
ATTORNEY-  
GENERAL  
v.  
JOHNSON.

authorise to be done after there has been an enquiry by a writ of *ad quod damnum*, which it cannot authorise without such a proceeding; and though some charters contain passages which purport to be a dispensation by the Crown with the writ of *ad quod damnum*, yet it deserves consideration whether this is a legitimate case for dispensing with such an antecedent proceeding. Upon this record the single question is, whether this be a nuisance, and so clearly a nuisance, that the King's Attorney-General suing in this Court, as he has a right to do, is entitled to call upon the Court to interpose for its prevention. That the place in question has been of utility to many persons there can be no doubt. Nor can it be disputed that what is said in the affidavits respecting the increased impetus which would be the effect of the proposed embankment, is correct. No person acquainted with this part of the river (in which embankments have been already made to a very great extent) can have failed to observe that the stream in these places has a much stronger impetus. Within my own remembrance a great number of embankments have been made in this part of the river. But the question is, whether this sort of proceeding can be authorised, and can be stated to be no nuisance? When the water is not quite low, a great number of vessels of different sizes employed in the navigation on the river, may be seen lying moored on the Surrey side between high and low water-mark, from Westminster to Vauxhall Bridge; and it is very difficult to say that the right to inclose the spot now in question, does not depend on considerations which would equally apply to the case of a grant by the City to Lord Grosvenor, of the right to embank the whole space between high and low water-mark from Westminster to Vauxhall. In this view the subject is of great importance; and as the name of the Attorney-General is upon this record, I think I am entitled to the assistance of his judgment, whether he considers it to be a case in which he ought to interpose for the prevention of the act complained of by this information.

If

If therefore Mr. Solicitor-General (a), will look at the record and all the facts, and communicate his opinion to me, I shall have no difficulty in stating my own view of the case.

1819.  
The  
ATTORNEY-  
GENERAL  
v.  
JOHNSON.

On a subsequent day Mr. Solicitor-General being applied to by the Lord Chancellor, expressed his opinion that this was a case in which the relator was entitled to the assistance of the Attorney-General for the prevention of the embankment.

June 29.

The LORD CHANCELLOR on this day referred to *Hind v. Manfield* (b), where the defendant was fined 200*l.* for diverting part of the River *Thames*, by which he weakened the current of the river to carry barges, &c. towards *London*, and other houses of the King upon that river, and it is added, "that such a thing cannot be done without an *ad quod damnum*, because that river is as an highway, and also it ought to be by patent of the King for to do such a thing." His Lordship added, that he was not aware whether any of the charters of the City which had been repeatedly confirmed by Act of Parliament, contained any passages which prevent the application of that doctrine to the present case. If a writ of *ad quod damnum* was necessary, there would be little utility in trying the indictment. In the mean time the matter must remain in its present state.

June 30.

The subject was not mentioned again in this Court; but the indictment was tried on the 12th of *July*, 1819, before

(a) Sir Robert Gifford. The office of Attorney-General was at this time vacant by the appointment of

Sir Samuel Shepherd as Chief Baron of the Exchequer in Scotland.  
(b) *Noy*, 103.

Lord

1819.

~  
The  
ATTORNEY-  
GENERAL  
v.  
JOHNSON.

Lord Chief Justice *Abbott* and a special Jury, and a verdict of Guilty found against all the defendants except *Earl Grosvenor*, and of Not Guilty against *Earl Grosvenor*; and the proposed embankment was abandoned (a).

(a) See *Barnes v. Baker*, *Ambl.* 158. 3 *Atk.* 750. *Coulson v. White*, 3 *Atk.* 21. *Ryder v. Bentham*, 1 *Ves.* 543. *The Attorney-General v. Dougherty*, 2 *Ves.* 453. *The Mayor of London v. Bell*, 5 *Ves.* 129. *The Attorney-*

*General v. Nicholl*, 16 *Ves.* 338. *The Duke of Grafton v. Hilliard*, cited by Lord Eldon in 18 *Ves.* 219. *The Attorney-General v. Cleaver*, *ibid.* 211.

ROLLS,  
July 12.

## HANSARD. v. KEMEYS.

By settlement, estates were limited to A. for life, with remainder to trustees for a term of years, for raising 4000*l.* for the portions of his younger

children, remainder to his first and other sons in tail-male. There was one son, B. and two daughters, C. and D. By act of Parliament passed during the children's minority, the estates were vested in trustees in fee, discharged from the uses of the settlement, upon trust to raise by mortgage or sale, the expences of the act, and of the trusts, and afterwards certain portions affecting the estate prior to the settlement, and private debts of A. to a large amount, and to convey the unsold estates, and the equity of redemption of those which should be mortgaged, to the uses of the settlement. Under this act the estates were mortgaged in fee for 41,386*l.* to E., who having died largely indebted to the Crown, and it appearing that the former act was obtained by false representations, it was provided by another act, that if on payment of 25,000*l.* into the Exchequer, the real and personal representatives of E. should convey the estates to some person to be approved by B. (who had then succeeded to the estate), the estates should be vested in such person, discharged of all claims of E. and of the Crown, to the intent to secure the re-payment of the money so paid into the Exchequer, to the person advancing the same, and subject thereto, in trust for securing such proportionable provision for C. and D. as they should be entitled to in respect of the portions originally secured upon the settled estates, and subject thereto in trust for B. The money was paid into the Exchequer, and the estates conveyed accordingly:—

Held that C. was entitled to a full half of the 4000*l.* with interest from A.'s death, and was not bound to contribute towards payment either of the 25,000*l.* or the expences incurred in obtaining or executing the acts of parliament.

John

1819.

HANSARD  
&  
KEMEYS.

*John Gardner Kemeys* was, at such marriage, tenant in tail of considerable estates in *Jamaica*, and at the date of the settlement seised of the same in fee, and that *Jane* his wife was seised in fee of a considerable real estate in *Monmouthshire*, subject to a term for raising 3000*l.* for her sister's portions, and to 300*l.* and interest secured by mortgage; *John Gardner Kemeys* in pursuance of an order of this Court, dated the 20th of *May*, 1755, and in consideration of the marriage, conveyed to *Fielde* and *Duroure* his undivided moiety of estates in *Jamaica*, subject to the incumbrances thereon, to the use of himself for life, without impeachment of waste, remainder to the trustees to preserve contingent remainders, remainder to the use and intent that his wife, if she survived him, might receive an annuity of 500*l.* for her life, remainder to Lord *Carysfort* and *L. S. Aynescombe* for 500 years, with remainder to the first and other sons of *John Gardner Kemeys* and *Jane* his wife successively in tail-male, remainder to *John Gardner Kemeys* in fee. The trusts of the term of 500 years were, first, to secure the annuity of 500*l.* to *Jane Kemeys* for life if she survived her husband, and subject thereto, after the death of *John Gardner Kemeys*, in case there should be two or more daughters or younger sons of the marriage, to raise 4000*l.* for the portions of such daughters or younger sons, to be equally divided, and to be paid to them at twenty-one or marriage, in case *John Gardner Kemeys* should be then dead, or otherwise within one month after his decease. By the same indenture of release, a fine previously levied of the *Monmouthshire* estate was declared to enure to the use of *John Gardner Kemeys* for life, remainder to trustees to preserve contingent remainders, remainder to Lord *Carysfort* and *L. S. Aynescombe* for 1000 years, in trust, in aid of and to be an additional security for making good the trusts of the term of 500 years, remainder to the first and other sons of the marriage successively in tail-male, remainder to *John Gardner Kemeys* in fee,

By



1819.

HANSARD  
v.  
KEMEYS.

By Act of Parliament, 12 Geo. III. "For investing the settled and unsettled estates of *John Gardner Kemeys, Esq.* in trustees, in trust by sale or mortgage to raise money to pay off portions and debts, and redeem annuities charged upon or affecting the same; and for resettling the mainder thereof, and lands to be purchased as in the act is directed, to the uses to which the said settled estates do now stand settled and limited;" after a recital of the settlement, and that *John Gardner Kemeys* had issue by *Jane* his wife, three children then living, namely, *John Kemeys Gardner Kemeys* then an infant, their only son and heir, *Jane Gardner Kemeys* and *Susanna Margaret Gardner Kemeys*, both infants; and that *John Gardner Kemeys* was seised in fee of an estate in *Monmouthshire*, which he had purchased since the execution of the settlement, which lay adjoining to and intermixed with the settled estates, and that the same was then of the annual value of 566*l.* or thereabouts, in which was some ore, likely to prove very beneficial, which had been lately discovered; and that since the execution of the settlement, *John Gardner Kemeys* had become seised of a convenient tract of land contiguous to the plantation in *Jamaica*, and that in consequence thereof he had expended several sums of money in improvements, and had extended the plantation, by means whereof the annual value of the same had been increased from 1200*l.* to 2500*l.* and was likely to be still further augmented; and that he had also expended considerable sums of money upon the settled estates in *Monmouthshire*, which, at the date of the settlement, were only of the value of 352*l. per annum*, in making divers improvements thereon, and particularly in planting a considerable quantity of oak and other trees, by means whereof the annual value or income of that estate had been increased to 981*l.* and that by the annual growth of the trees so planted, the inheritance would in a few years be considerably improved. That *John Gardner Kemeys*, in order to enable him to make the aforesaid improvements, and thereby to increase

increase the annual income, and also the value of the inheritance of the settled estates, had been obliged not only to contract debts to the amount of 31,976*l.* and upwards, but also to grant redeemable annuities out of the settled estates during his life to the yearly amount of 1300*l.* which, with the 3000*l.* remaining due to the assignees of the sisters of his wife, and of 300*l.* due on mortgage charged on the settled estates prior to the settlement, amounted to 44,026*l.* or thereabouts; and that he had been threatened with suits at law and equity in respect of such debts, and had no means of discharging the same; that under the circumstances, he had been advised that it would be much more for the benefit of himself and family, and of all persons claiming under the limitations of the settlement, and would be the means of preserving great part of the settled and unsettled estates, if he were enabled by sale or mortgage of all or a sufficient part of the same, to raise money sufficient to discharge the debts, and to redeem the annuities, as a clear estate of inheritance would then be left for the benefit of himself and family of the annual value of 2500*l.* and upwards, exclusive of such benefit as might thereafter arise from the ore discovered in the unsettled estates; and that in order to make a recompence to the issue male under the limitations in the settlement, for the prejudice, if any, that might accrue to him by virtue of such sale or mortgage, *John Gardner Kemeys* had consented that so much of the plantations and other settled estates as should not be sold, and the equity of redemption of so much as should be mortgaged, should be absolutely discharged from any future debts that he might contract; and that so much of the plantation estates as had been purchased by him since the execution of the settlement with the improvements made in the plantation and estates, which, on a fair calculation, might be valued at 18,000*l.* together with the real estate in *Monmouthshire*, whereof he was seised in fee, except the mines and minerals within the said estate, and was then of the yearly.

1819.

HANSARD  
v.  
KEMEYS.

1819.  
  
 HANNAH  
 v.  
 KEMEYS.

yearly value of 566*l.* and worth to be sold for 15,000*l.* at the least, should, subject to the raising the aforesaid 44,026*l.* be vested in trustees, and settled to the same uses as the estates comprised in the settlement did then stand *limited*; and that for a further recompence to such issue male, *John Gardner Kemeys* would also give up for his benefit, the claim which he had on the settled estates in *Monmouthshire*, in respect to the improvements by him made thereon, computed to amount to 8000*l.*, and also waive his power of cutting timber and committing waste upon the settled estates computed to be worth 5000*l.* at the least; and would also consent that one-third part of the clear profits which might arise from the mines and minerals then or thereafter to be discovered in the unsettled estates, should be vested in trustees as an accumulating fund towards paying off and discharging the money thereon to be raised, as far as the same should extend for that purpose; but that although the effecting of the said proposal would not only tend to the immediate relief and preservation from ruin of *John Gardner Kemeys* and *Jane*, his wife, and their family, but would also preserve the greatest part of the settled and unsettled estates for the benefit of themselves, and the issue male claiming under the limitations of the settlement, yet by reason of the limitations, and the minority of their only son, the same could not be effectually accomplished without the authority of Parliament; It was enacted, that the undivided moiety of the plantations, and all other the hereditaments of *John Gardner Kemeys*, in *Jamaica*, and all the settled estates in *Monmouthshire*, and all other the estates of *John Gardner Kemeys*, in *England*, except the mines discovered or to be discovered in any part of the premises purchased by him since the settlement, should from the 21st of *June*, 1772, be vested in and settled to the use of *J. C. P. Fielde*, and *Joseph Bankes*, their heirs and assigns for ever, discharged from the uses and trusts declared by the settlement; upon trust to raise by sale or mortgage of the estates with the

the consent of *John Gardner Kemeys*, such sums as should be necessary for paying the costs of the act and expences of the trusts, and in the next place for discharging the portions, debts, and incumbrances, and redeeming the annuities specified in the second schedule to the act, and all interest and arrears; and after such payment to convey so much of the premises as should remain unsold, and the equity of redemption of such of them as should be mortgaged, and such estates as should be purchased with any surplus money according to the directions of the Act, to such and the same uses, and upon the same trusts as by the settlement are created and declared concerning the undivided moiety of the plantations and premises, or such of them as should be capable of taking effect.

1819.  
HANSARD  
v.  
KEMEYS.

By indentures of lease and release dated the 26th and 27th of *June*, 1772, the trustees under the act conveyed all the settled and unsettled estates in *Jamaica* and *England*, to *Robert Mackreth*, in fee, as a trustee for *Richard Rigby*, by way of mortgage for securing 48,000*l.* and interest, stated to have been advanced to them by *Rigby*; and they applied that sum in discharging the debts and incumbrances, and redeeming the annuities provided for by the act, but it appearing that the trustees had exceeded their power, the principal of the mortgage was reduced by a decree of this Court, to 41,386*l.* 13*s.* 6*d.*

*John Gardner Kemeys* died in 1793, leaving *Jane*, his wife surviving, and leaving issue by her, his son *John Kemeys Gardner Kemeys*, and two daughters, *Jane*, the wife of *Providence Hansard*, and *Susanna Margaret Gardner Kemeys*.

By another Act of Parliament 34 *Geo. III.* reciting that 53,000*l.* was due to *Rigby's* estate for principal and interest exclusive of costs; that *John Kemeys Gardner Kemeys*, instead of coming into possession, as he had a right to expect  
on

1819.

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 HANSARD  
 v.  
 KEMEYS.

on his father's death, of the estates comprised in the settlement, was stripped of all provision made for him by such settlement, and of all means of subsistence; and that *Jane Gardner Kemeys*, *Jane Gardner Hansard*, and *Susanna Margaret Gardner Kemeys*, were also by reason of the act before stated, totally deprived of the jointures and portions provided for them by the settlement; that by a survey and valuation of the *English* estates, and an estimate of the value of the *Jamaica* estates, the whole of the said estates appeared to be of the value of 40,000*l.*, and that it appeared by the evidence given before the committee of the *House of Lords* on the bill previous to passing the said act, that the several allegations therein contained were proved or attempted to be proved by several persons who were then examined upon oath, but that it had since been discovered that the grossest imposition had been practised on Parliament, by the false evidence of such witnesses in several instances particularly referred to; and that the whole of the *Jamaica* estates instead of producing an income of 2500*l. per annum*, had not for the last seven years yielded one year with another more than 1000*l. per annum*, nor the *English* estates more than 500*l. per annum* net, upon an average, a sum greatly insufficient to pay the interest of the mortgage. That *Rigby* died indebted to the Crown in a large sum, of which 140,000*l.* and upwards remained due; that inasmuch as the grievous misfortunes of *J. K. G. Kemeys*, and of his mother and sisters, were occasioned by the extraordinary interposition of the legislature, in setting aside the settlement which would have secured competence and affluence to him, and which interposition was founded on a gross misrepresentation of facts, and made at a time when his tender years rendered it impossible for him to take any steps to prevent his estate from being injuriously taken from him, and that it happened from the circumstance of the money due to the Crown from *Rigby's* estate not being paid, that *J. K. G. Kemeys* and his family, might be relieved from the cruel injustice they had

had sustained, without interfering with the private interest of individuals, or the application of the money already appropriated to the public service, if it should be thought that the hardship of their case entitled them to hope for relief; and that it had been proposed that the Crown should as between itself and the representatives and private creditors of *Rigby*, be considered as entitled to the whole benefit of the mortgage, and the mortgaged estates being estimated to be of the value of 40,000*l.*, that *Rigby's* estate should be discharged from 40,000*l.*, part of the debt due to the Crown; which proposal being apprehended to be highly beneficial to the representatives and private creditors of *Rigby*, would be acceded to on their part; that *Kemeys* was desirous of having the mortgaged estates vested in trust for himself and his family, on his procuring to be paid into the Exchequer such sums of money as under the aggravated distress of his case attended with all the peculiar circumstances, Parliament in their wisdom and humanity should think reasonable; and that in order thereto he proposed that such reference and such further proceedings as after mentioned should take place: It was on his petition enacted, that if it should appear to the Lords Commissioners of the Treasury, that it would be necessary to resort to the mortgaged premises in order to recover the balance due from *Rigby* to His Majesty, it should be lawful for them to enquire and ascertain what sum would be reasonable and proper under all the circumstances of the case to be paid into the receipt of the Exchequer, in consideration of the Crown's releasing *Rigby's* estate from 40,000*l.* part of the debt due to the Crown from the said estate, and also in consideration of the mortgaged estate being vested in proper persons for the purposes after mentioned, discharged from all claims on the part of the Crown, and thereupon to receive for His Majesty's use the money so to be ascertained: and it was further enacted, that if upon payment into the Exchequer of the sum to be so ascertained, the real and personal representatives of *Rigby*,

1819.

HANSARD  
&  
KEMEYS,

1819.  
  
 HANSARD  
 v.  
 KEMEYS.

and all persons interested in trust for them, should convey the mortgaged *English* and *Jamaica* estates to one or more person or persons to be approved of by *John Kemeys Gardner Kemeys*, his heirs and assigns, and to the heirs, executors, &c. of such person or persons according to the quality of such estates, upon the trusts and for the purposes thereafter mentioned concerning the same, then and thenceforth the real and personal estate of *Rigby*, and his heirs, executors, and administrators, should be released from the sum of 40,000*l.* part of the debt due from *his* estate to the Crown; and also from thenceforth the mortgaged estates in *England* and *Jamaica*, should remain vested in the person or persons to whom the same should be conveyed as aforesaid, freed and discharged from all claims of the real and personal representatives and creditors of *Rigby*, and also from all claims and demands of His Majesty, his heirs and successors, on account of the debt due to the Crown from the estate of *Rigby*; and also from all the uses and trusts limited and declared by the settlement, and the first Act of Parliament or either of them; but nevertheless, to secure the re-payment of the sum of money so to be paid into the Exchequer as aforesaid, to the person or persons advancing the same with interest, and subject thereto, "in trust for securing such proportionable provision for *Jane Gardner Kemeys*, *Jane Gardner Hansard*, and *Susannah Margaret Gardner Kemeys*, as they shall be entitled to "in respect of their aforesaid jointure or portions originally secured upon the aforesaid settled estates, and subject as aforesaid, in trust for *John Kemeys Gardner Kemeys*, "and his heirs, executors, administrators, and assigns, absolutely, according to the nature of the same estates and "premises respectively." This act contained a saving to all persons, bodies politic, and corporate, and their heirs, successors, executors, and administrators, (except His Majesty, his heirs and successors, and the heirs, executors, and administrators of, and all persons claiming under or in trust for

for *Rigby*, and the said *J. K. G. Kemeys, Jane Gardner Kemeys, Providence Hansard, and Jane*, his wife, and *Susannah Margaret Gardner Kemeys*, and their respective heirs, executors, administrators, and assigns, and all other persons claiming any estate or interest in the mortgaged estates by the settlement, mortgage, and former Act of Parliament) all such estate, &c. in the mortgaged premises as they had before the passing of the Act of the 34 Geo. III. or could have had if that act had not been made.

1819.  
HANSARD  
v.  
KEMEYS.

By another act of the 41 Geo. III. to explain and amend the former, after reciting the settlement and two former acts, and that *Rigby's* personal estate, except the mortgage before mentioned, had been applied towards satisfaction of his debt to the Crown, which was thereby reduced to 90,000*l.* but inasmuch as *Rigby's* real estates were found to be more than sufficient to discharge the residue his debt to the Crown, and therefore it would not be necessary to resort to the mortgaged premises to recover the balance so due, whereby *John Kemeys Gardner Kemeys*, and his family, found themselves deprived of any relief under the last act, which he could not but presume it was the intention of the legislature to afford them, notwithstanding the condition therein recited, which he apprehended was introduced by mistake, as being contrary to the petition on which the 34 Geo. III. was founded, and the principle on which it was favourably received by Parliament: *John Kemeys Gardner Kemeys*, on behalf of himself and his two sisters, prayed that it might be enacted, and it was thereby enacted, that it should be lawful for the Lords Commissioners of the Treasury, and they were required at any time after the passing of that Act, to ascertain what sum of money would be proper to be paid into the receipt of the Exchequer, in consideration of the Crown's releasing the estate of *Rigby* from 40,000*l.* part of the debt due to the Crown from the said estate, and also in consideration of the mortgaged estate being vested in



1819.

HANSARD

v.

KEMEYS.

proper persons for the purposes aforesaid, discharged of all claims on the part of the Crown; and thereupon to receive for his Majesty's use the sum of money so to be ascertained, and upon payment thereof to deliver to the persons making the payment, a certificate of its having been made; and that if on such payment into the Exchequer, the real and personal representatives of *Rigby*, and all persons interested in trust for them, should convey the mortgaged estates to one or more person or persons to be approved by *John Kemys Gardner Kemys*, his heirs or assigns, upon the trusts thereafter declared, the real and personal estate of *Rigby* should be discharged from 40,000*l.* part of the debt due from his estate to the Crown, and from thenceforth also the mortgaged estates should remain vested in the person to whom they should be so conveyed, freed and discharged of all claims of the real and personal representatives, and creditors of *Rigby*, on account of the mortgage, or the costs, and also of all claims of his Majesty on account of the debt due to the Crown from *Rigby's* estate; and also of and from all and singular the uses and trusts, entails and limitations declared by the indenture of Settlement and Act of Parliament; but nevertheless, to the intent and purpose to secure the re-payment of the sum of money so to be paid into the Exchequer, to the person advancing the same with lawful interest, and subject thereto, "In Trust for securing  
 " such proportionable provision for the said *Jane Gardner*  
 " *Hansard*, and *Susannah Margaret Gardner Kemys*, as  
 " they shall be entitled to in respect of the aforesaid portions originally secured upon the aforesaid settled estates;  
 " and subject as aforesaid in trust for the said *John Kemys Gardner Kemys*, his heirs, executors, administrators, and assigns, absolutely and for ever, according  
 " to the nature of the same estates respectively." This act contained a saving to the same effect as that in the 34 Geo. III.

The Lords of the Treasury having, pursuant to the authority of the above-mentioned Acts, certified that 25,000*l.* was a sum proper to be paid into the receipt of the Exchequer, that sum was accordingly paid in by *John Wiltshire*, on the 30th *July*, 1802, and the mortgaged estates were thereupon, by lease and release dated the 29th and 30th of *July*, 1802, with the consent of *John Kemeys Gardner Kemeys*, conveyed by *Muckreth*, and the real and personal representatives of *Rigby*, to *Wiltshire*, in fee; subject to redemption if *J. K. G. Kemeys* should pay to *Wiltshire* 25,000*l.* and interest, and if he should also pay to *Jane Gardner Hansard*, and *Susanna Margaret Gardner Kemeys*, or their representatives, such proportionable provision as they were or should be entitled to in respect of their respective portions originally secured to them by the settlement.

1819.  
HANSARD  
v.  
KEMEYS.

The bill was filed by the daughter and personal representative of *Jane Gardner Hansard*, against *John Kemeys Gardner Kemeys*, and several other persons interested under conveyances and settlements made by him after the passing of the last act, and against *Wiltshire*, the mortgagee, and *John Pearson*, an incumbrancer claiming under *Mrs. Hansard*, praying a declaration of the plaintiff's right to one moiety of the portions charged by the settlement of 1756, with all arrears of interest, subject to such claim as the defendant *Pearson* might have thereon, and an account and payment accordingly; and in default of payment, that what was due to the plaintiff might be raised by sale of the settled estates; and that if the Court should be of opinion, that the whole of *Mrs. Hansard's* portion ought not under the circumstances to be raised out of the settled estates, the Master might ascertain what sum should be deducted therefrom, and in that case that the residue might be raised and paid.

The defendant *Kemeys* by his answer, stated that previously to the time of application being made for the last Act  
of

1819.  
  
 HANSARD  
 v.  
 KEMEYS.

of Parliament, the representatives of *Rigby* required, as the conditions for their consenting to the arrangement with the Lords of the Treasury, that the defendant should pay to them 3000*l.* claimed by them for arrears of interest up to the 30th of *November*, 1801; and that they afterwards claimed, and the defendant gave security for, the payment of 1923*l.* 5*s.* 9*d.* being the interest from the 30th of *November*, 1801, to the time when the 25,000*l.* was paid, which the defendant consented to, and that the 1923*l.* 5*s.* 9*d.* still remained due: that the defendant expended 2500*l.* and upwards, for the expences attending the soliciting and procuring the two last acts, and other law charges incurred in respect of the matters aforesaid, which sums he submitted were charges on the estates prior to the claims under the settlement of 1756, and the Acts of Parliament; that the first act of the 12 *Geo.* III. ought not to be considered void as against the plaintiff, otherwise than as it is so declared by the acts of 34 and 41 *Geo.* III. which acts he alledged, that he petitioned for on behalf of himself and his sisters, and with the knowledge and concurrence of *Jane Gardner Hansard*, and her husband, in consequence of his having been advised that the provisions of the 12 *Geo.* III. were effectual to bind all parties interested in the settled estates, and could not be annulled, but by the authority of Parliament; he admitted, that ever since the execution of the deeds of *July* 1802, he had been and still was in receipt of the rents of all the *English* and *Jamaica* estates comprised in the acts, except parts subsequently sold under a conveyance in trust for sale made by the defendant himself; that the value of the estates, exclusive of those sold and contracted to be sold, was about 45,000*l.* estimating the *English* estates at twenty-three, and the *Jamaica* estate at eleven years purchase, on the present rentals; but that when he took possession in 1802, they were not worth more than 37,200*l.*, of which the *English* estates, including the timber, (amounting to 12,000*l.*) were worth 24,000*l.*; that the yearly value of the *English*

*English* estates not sold, was about 1036*l.* and of the *Jamaica* estates, about 1600*l.*; that since he took possession he had cut down and sold timber to the amount of 8700*l.* and received rents and profits to the amount of 26,000*l.*; that several parts of the *English* estates had been sold under a conveyance made by him to trustees for that purpose, for 21,495*l.* which money had been received by the trustees, and that they had contracted for the sale of another part of the estate for 12,441*l.* 16*s.* which had not yet been received.

The defendant submitted, that it was the intention of the Legislature in passing the two last acts, and was apparent in the body of the act, that a deduction should be made from the portion of 2000*l.* originally secured to *Jane Gardner Hansard*, proportioned to the deficiency in value of the estates which the defendants became possessed of under those acts, compared with the estates which he would have taken under the settlement, after deducting from the value thereof, the costs and expences to which the defendant had been put to, and which deficiency he estimated and believed to have been very considerable, as according to his belief he should have been possessed in 1801 under the settlement, of estates, worth 28,200*l.* subject to incumbrances to the amount of 7900*l.*; but that he took at that period under the acts of 34 and 41 *Geo. III.*, estates, the value of which amounted to 37,200*l.* with incumbrances to the amount of 33,560*l.* besides the expences which he was put to in order to get possession of the estates.

1819.  
HANSARD  
v.  
KEMYS.

Mr. *Horne* and Mr. *Dowdeswell* for the plaintiff. The question is, whether the Acts of Parliament have affected the interests of the younger children. Assuming for the present that the language of the acts is sufficient to affect them, yet a private act of Parliament is a mere private assurance, and subject to the application of all the same principles as a conveyance; and though the Court cannot divest the

1819.

**HANSARD  
v.  
KEMEYS.**

the legal estate from those in whom the act may vest it, yet if the act is obtained by fraud, a Court of Equity will deal with it as with a deed obtained by similar means. *Biddulph v. Biddulph* (a). No assurances are of a more solemn nature than fines and common recoveries; and when obtained by fraud, the Court does not affect to annul them, or to displace the legal estate, but declares the persons in whom it is vested to be trustees for those equitably entitled. The act of the 12 Geo. III. was obtained by an imposition on the Legislature. It contains no words indicating an intention to affect the rights of the daughters; it was merely for the purpose of enabling the father to raise money on security of the estates. The only interests meant to be affected were those of the father and of the issue male; the jointure and portions were to be left untouched; and if it had been intended that Mrs. *Hansard's* portion should be affected by the subsequent acts, her consent would have been required, which does not appear to have been given; if it had, the acts would have been stated to have been passed on her application, and not merely on that of the defendant *Kemeys*.

Mr. *Wetherell* and Mr. *Shadwell* for the defendants. The real question is, in what proportions the owner of the inheritance, and the persons entitled to the portions, are to contribute towards the redemption of the mortgage. The legislature must have proceeded on the principle that the defendant *Kemeys* was disincumbering the estate for the benefit of himself and the other parties interested. Except for the fraudulent act of Parliament there would have been no incumbrance on the settled estates. By that act the settled estates (including the portions) were made liable to a burthen; and when the defendant stepped forward to redeem them, it is but justice that all parties interested should contribute according to their proportions. The money paid

(a) 4 *Cruise's Digest*, 549. See *Hamilton*, 4 *Cru. Dig.* 545. and also on the same subject, *Macpensis v. Stuart*, and *Richardson v. 2 Bl. Comm.* 346.

into the Exchequer is in substance his money when it is a charge on his estate. Suppose the portions had been so large that with the 25,000*l.* they had exhausted the whole estate, could the portioners have had the benefit of their portions without contribution? The interests of the son and daughters were by the first act of Parliament liable to be entirely defeated, but the second act provided that on certain terms the estate might be disincumbered. If the portion be claimed under the act, it cannot be claimed more beneficially than the act has given it; and the act has not directed that it shall be paid in full. The words are "such proportionable provision," which negative the supposition that the whole of the portions are to be paid. The sum of 25,000*l.* was paid for recovering back the estate; supposing that to be five-eighths of the value, a proportionate deduction should be made from the portions, the amount of which may be ascertained by a reference to the Master.

1819.  
HANSARD  
v.  
HANSARD

Mr. *Horne* in reply. The argument for the defendant assumes the whole question. There is a fallacy in supposing the legislature to have intended to fix any scale of proportion, or to have imposed a necessity for calculating any proportions. The word "proportionable" may have a reasonable construction by resorting to the original settlement, which provides 3000*l.* for the portion of one younger child, and 4000*l.* for two or more with other sums in case of a larger number. None of the children were to be entitled to any specific sum, but to shares of a common fund. The words will admit of another very reasonable interpretation. There might be a deficiency to pay the arrears of the jointure and portions, and they must then take with reference to their original shares under the settlement. It may also allude to proportions as between the two estates, for in the former part of the settlement the portions are to be raised by a term of 500 years in the *Jamaica* estate, but in the latter part a term of 1000 years is created in the *Monmouthshire* property,  
in

1819.

HANSARD  
v.  
KENNYS.

in aid of the estate primarily charged. The acts were not intended to disturb the proportions either of the estates or of the parties.

*The MASTER of the ROLLS.* The only question in this case is, whether any thing has been done to take away the right given by the settlement of 1756, for if that settlement remains in force there can be no doubt respecting the plaintiff's title to a moiety of the 4000*l.* provided for the portions of the daughters; and this question is to be determined under very novel and peculiar circumstances. It certainly was not the intention of the legislature by the first Act of Parliament to take away the portions. The act was intended merely to let in an incumbrance on the estate, not doubting that its value was sufficient to bear the jointure and portions, giving a compensation to the father, and granting to him the right to incumber the estate, on his bringing within the operation of the settlement, other estates which were alledged to be sufficient to indemnify against the incumbrances to be created under the authority of the act. It proceeded on a misrepresentation; but there was no intention to deprive the eldest son of his right. Nothing was meant to be given to the father, but a power to create incumbrances to a very large amount, he having, as it was supposed, augmented the fund: all the other incumbrances were to remain as before. It afterwards turned out that false representations were made of the value of the unsettled *English* estates, of the value of the timber and the ore; and that the *Jamaica* estate had also been greatly over-rated. In the mean time the estates had under the powers of the Act of Parliament, been mortgaged for a large sum to *Rigby*, who died greatly indebted to the Crown. By the 34 *Geo. III.* the Lords of the Treasury were authorised to remit part of the debt. The whole object of that act was to reduce the liability of the mortgaged estates. That is a strong circumstance to shew that subject to the liability, the rights of the persons interested

1819.

HANSARD  
v.  
KEMETZ.

interested in the estates, were to remain as before. The debt on the estate was under the operation of the act, reduced from 40,000*l.* to 25,000*l.* The effect of the act was only to exonerate the estate from a part of the debt, not to discharge it from the whole. It reduced the incumbrance to a certain extent, but in other respects left it as before. It was not intended that the creditors or representatives of *Rigby* should be sufferers; they were merely relieved from the debt to the Crown to that extent. That this was the object of the legislature, is apparent from the preamble to the act of the 34 *Geo.* III. The mortgaged estates were to be subject in the first place to the payment of the money advanced in discharge of the limited debt to the Crown, and in the next place to what should be due on the settlement. The settlement was to be untouched; for though it is directed that the estates should be discharged from it, they were to be immediately made again liable to its provisions. It is impossible therefore to consider, that the settlement was intended to be abrogated. The last of the three acts did nothing more than remove any doubt occasioned by the reduction of *Rigby's* debt. If then there be a fund to answer the purposes of the settlement, what is there to take away the rights of the parties? Those who resist the plaintiff's claim, are bound to shew that something in the Acts of Parliament has taken away the benefit; for it is clear, that it is not taken away by express words. The act of 34 *Geo.* III. recites the distressed state of this family, in consequence of the incumbrances affecting the estates, not because the settlement was destroyed, but because the fund was taken away. If there were any estates, the settlement was still in force. It is incumbent on the defendant to shew that something has had the effect of taking away the settlement. It must be shewn that this act which intended to relieve the family, meant to do so by the application of some other rule than that which is afforded by the settlement; if no other clear rule should be shewn, there being no express



1819.

~  
 HANSARD  
 v.  
 KEMEYS.

press words to destroy the settlement, it must be adhered to. The Court cannot abrogate one rule without establishing another. The Legislature must have intended to prescribe some rule for ascertaining the extent of the provision for the daughters, and not to render it necessary to take a retrospect of all the past losses and gains of the family. It has been very ingeniously argued, that the words "such proportionable provision for the said *Jane Gardner Hansard*, and *Susan Margaret Gardner Kemeys*, as they should be entitled to in respect of their aforesaid jointure or portions originally secured upon the aforesaid settled estates," have introduced some other scale of calculation than that which is given by the settlement. It is to be recollected that this act was not meant to annihilate either the settlement or the debt to the Crown. The words of the act were, in form, that the estate was to be re-conveyed to the defendant *Kemeys*, discharged of all liability, even of the liability to the Crown's debt; but it is again immediately subjected both to the debt and to the settlement. It is clear, that the daughters were meant still to be entitled to something under the settlement. The single question is, whether by means of these words "proportionable provision," the Court can find any rule for ascertaining the proportion to which they are to be entitled. The words are not very clear, but they are capable of reasonable interpretation. It is clear that the settlement was not to be affected. Is it then to remain the criterion for determining what is to be due to the daughters? The words of the act clearly shew that it is. It is the proportionable provision of their portions "originally secured on the said settled estates." This surely must be taken to refer to the sum originally secured on the settled estates, namely, 4000*l*. The phrase "proportionable provision" was not improper, for it was possible that some part of the jointure and portions might have been previously paid either to the widow or the children. It was therefore a matter respecting which enquiries might be necessary. The proportion

tion depended in some measure on the number of the family, and was a subject to be ascertained by calculation. It signifies that proportionable provision which the settlement has made. The very words point to the settlement as affording the rule for division. They do not refer to such proportions as shall now be reasonable, having regard to the monies which have been paid for disincumbering the estate, but they lead us directly to the settlement. This is not such a violent construction as to lead the Court to reject it, and to wander into enquiries concerning what is just and proper, having regard to the losses sustained by the owner of the estate. It is impossible that the Legislature could intend that there should be any such vague and indeterminate mode of ascertaining the portions; on the contrary, the original settlement appears to have been directly in their contemplation. The intention might possibly have been expressed with a greater degree of clearness, but the Court ought, for the sake of certainty, to adhere to the plain and obvious rule which results from the circumstance of the settlement being left entirely untouched by the acts. It is observed, that according to this construction, the daughters are to be paid in full, and the son is left to sustain all the loss. But I have no reason to suppose that this was not really the intention of the Legislature; it is clear that he receives a bounty from the Crown, and it was probably intended that he should be left a sufferer to a certain extent. As he was to be a sufferer in a certain degree, how is it possible to know the exact extent? He recovers back his estate with certain incumbrances, and the daughters recover back their portions. He has profited largely by the restitution, though perhaps not quite to so great an amount as if the proportions had been settled by some other rule, of which, however, we are ignorant. There is no ground for going back till the year 1772 to ascertain all that *John Gardner Kemeys* had brought in by augmenting the property, and to ascertain the quantum of loss which should fall on the different members of the family.

1819.

HANSARD  
v.  
KEMEYS.

1819.  
  
 HANSARD  
 v.  
 KEMEYS.

family. The act of Parliament has not taken away the plaintiff's right: she is therefore in the same situation as if it had not passed, and consequently entitled to a moiety of the 4000*l.* with interest from the death of *John Gardner Kemeys*.

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" His Honour doth declare, that the plaintiff as personal  
 " representative of *Jane Gardner Hansard* in the bill named,  
 " is entitled to one moiety of the portion or sum of 4000*l.*  
 " secured upon the settled estates in the pleadings mentioned,  
 " by indentures of the 13th and 14th of *April*, 1756, for the  
 " younger children of *John Gardner Kemeys* and *Jane* his  
 " wife, together with interest thereon after the rate of 4 *per*  
 " cent. *per annum* (unless any other rate of interest is di-  
 " rected by the above-mentioned indentures) from the time  
 " of the death of *John Gardner Kemeys*, subject to such  
 " claim as *John Pearson*, in the bill named, may have  
 " thereon: And doth order and decree, that it be referred to  
 " Mr. *Harvey*, one of the Masters of this Court, to take  
 " an account of what is due for principal and interest in  
 " respect of such moiety of the said portion accordingly;  
 " and it is ordered, that the Master do also take an account  
 " of what is due to the defendant *John Pearson* in respect  
 " of his claim by virtue of the assignment bearing date the  
 " 12th of *December*, 1809, in the pleadings stated, and to tax  
 " him his costs of this suit; and it is ordered, that the plain-  
 " tiff do pay to the defendant *John Pearson* his costs when so  
 " taxed; and it is ordered, that the defendant *John Kemeys*  
 " *Gardner Kemeys* do pay unto the defendant *John Pear-*  
 " *son* what the Master shall find due to him upon taking the  
 " accounts before directed; and it is ordered, that the said  
 " defendant do also pay to the plaintiff what the Master  
 " shall certify to be remaining due to her, after deducting  
 " what shall be so paid to the said *John Pearson*, together  
 " with the costs of this suit to be taxed; and upon such  
 " several

“ several payments being made as hereinbefore directed, it is  
 “ ordered, that the plaintiff, and the said defendant *John*  
 “ *Pearson*, and all other proper parties, do release and re-  
 “ assign the estates and premises from the said moiety of the  
 “ portion, and all interest thereon, such release to be settled  
 “ by the Master in case the parties differ about the same.”

[Reg. Lib. A. 1818, Fol. 2185.]

1819.  
 HANSARD  
 v.  
 KEMYS.

Ex parte SIMPSON.

July 15.

ON the 22d of *May*, 1819, a commission of bankrupt issued against *Simpson*, under which he was summoned by notice dated the 5th of *June*, to surrender at *Guildhall* on the 5th and 12th of *June*, and the 6th of *July*. He accordingly surrendered on each of those days; and on the 6th of *July*, the commissioners adjourned his last examination to the 13th of that month. On the 5th of *June* the commissioners indorsed on the summons, a memorandum, stating that he had surrendered himself, but not being prepared to make a full disclosure of his effects, prayed further time for that purpose, which the commissioners granted him accordingly. On the 13th of *July*, he again attended the commissioners, and finished his examination. On his way home from *Guildhall* he was arrested under a *capias ad satisfaciendum*, at his counting-house, at which he had called at the request of his assignees, for the purpose of examining some of his books of account. The street in which the counting-house was situate was in the direct road from *Guildhall* to the bankrupt's place of abode.

When the commissioners adjourn the last examination of a bankrupt, he is privileged by statute 5 Geo. 2. c. 30, from arrest during the whole of the day to which it is adjourned.

Mr. *Beames* on behalf of the bankrupt, now applied by motion to the Lord Chancellor for his discharge from the arrest. By the 5 Geo. 2. c. 30, the bankrupt is protected to the end

of

1819.

*Ex parte*  
*Simpson.*

of the forty-second day, *Ex parte Donlevy* (a); and the enlarged time is on the same footing as the forty-two days, according to *Ex parte Price* (b). In the present case there had been an enlargement till the day of the arrest, consequently the bankrupt was protected during the whole of that day. But independent of his protection under the statute, the bankrupt was protected at common law. He was returning directly from his last examination; the circumstance of his calling at his counting-house by the direction of his assignees does not amount to such a deviation as to deprive him of the privilege. *Ex parte Donlevy* (c), *Ex parte Jackson* (d).

Mr. Rose, *contra*, admitted that if the bankrupt had finished his examination on the forty-second day, and had afterwards on that day been arrested, he would have been entitled to his discharge, but he adverted to the difference between the language of that part of the statute which relates to the forty-two days, and that which relates to the enlarged time. The bankrupt is to be protected "for and" during the said forty-two days, or such further time as "shall be allowed to such bankrupt or bankrupts for finishing his, her, or their examinations:" shewing by the use of the word "days," that the whole of each day was meant to be comprehended; but in the latter passage the "time" of the enlargement is referred to. The necessity for further time being given, arises from the default of the bankrupt in not being prepared, and the expression therefore should not be construed indulgently. The time of the enlargement is the limit of his protection, and although on the forty-second day he might have taken the whole twenty-four hours to surrender, yet if that day had passed, the time of adjournment and of the fixed special appointment is that to which he is to be considered as bound to conform. And he

(a) 7 Ves. 317.

(b) 3 Ves. &amp; Bea. 23.

(c) 7 Ves. 317.

(d) 15 Ves. 116.

referred to *Ex parte Davis* (a), where the Lord Chancellor appears to have had doubts on the point. It appears, too, that the bankrupt had finished his examination a considerable time before the arrest, and was sitting in his counting-house when it took place.

1819.

*Ex parte  
SIMPSON.*

Mr. Beames, in reply, was stopped by the Court.

The LORD CHANCELLOR said that in *Ex parte Davis* it was immaterial for him to deliver an opinion as to the enlarged day, and that he was not in the habit of delivering opinions when they were not required by the circumstances of the case; but that he considered the same rule to apply to the enlarged day, as to the forty-two: and his Lordship ordered the bankrupt to be discharged (b).

(a) 1 Buck, 80.

(b) On the subject of a bankrupt's privilege against arrest, in addition to the authorities cited above, see *Kenyon v. Solomon*, Cowp. 157. *Darby v. Baugham*, 7 T. R. 209. *Davis v. Trotter*, 8 T. R. 476. *Arding v. Flower*, *ibid.* 534. *Spence v. Stuart*, 3 East, 89. *Ex parte Parker*, 3 Ves. 554. *Ex parte Hawkins*, 4 Ves. 691. *Ex parte King*, 7 Ves. 512. *Sidgier v. Birch*, 9 Ves. 69. *Ex parte De*

*Fries*, *Beaves's Lex Merc.* 538. *Ex parte Dumbell*, 10 Ves. 328. *Ex parte Ogle*, 11 Ves. 556. *Ex parte Johnson*, 14 Ves. 36. *Anonymous*, 15 Ves. 1. *Ex parte Wood*, 18 Ves. 1. S. C. 1 Rose, 46. *Ex parte Ross*, 1 Rose, 260. *Ex parte Russell*, *ibid.* 276. *Ex parte Temple*, 2 Ves. & Bea. 391. 2 Rose, 22. *Ex parte M'Williams*, 1 Sch. & Lefr. 169. *Ex parte Gibbons*, 1 Atk. 238.

1818.

January 15. 29.

March 4.

1819.

April 3. 29.

May 27.

June 8. 19.

August 5. 9.

Estates were settled by act of Parliament on the first Duke of Marlborough for life, with remainder to the heirs male of his body, remainder to his daughters in such manner as his titles were limited by the same act, "in order that they may always go along, and be enjoyed with the titles and dignities;" and with a proviso that no person to whom the premises should descend, should have any power to hinder those to whom the

## DAVIS v. The Duke of MARLBOROUGH.

QUEEN Anne, by letters patent dated the 5th of May, in the fourth year of her reign, pursuant to the power given to her by act of Parliament, 3 and 4 Anne, c. 6. "For the better enabling her Majesty to grant the honour and manor of Woodstock, with the hundred of Wootton, to the Duke of Marlborough and his heirs, in consideration of the eminent services by him performed to her Majesty and the public;" granted to John, Duke of Marlborough in fee, the honour and manor of Woodstock, and the hundred of Wootton, and other estates in Oxfordshire. By statute 5 Anne, c. 3, "For settling the honours and dignities of John, Duke of Marlborough, upon his posterity, and annexing the honour and manor of Woodstock, and house of Blenheim, to go along with the said honours;" for perpetuating the memory of the several great actions performed by the Duke, the titles were limited in a line of succession, specified in the act, on failure of his issue male: And to the intent that the honour, manor, and park of Woodstock, and the house then erecting there, called Blenheim, and the hundred of Wootton, and the other estates comprised in the

estates were thereby limited from enjoying them according to the limitations;—Held, that the estates might nevertheless be charged by the person for the time being entitled, to the extent of his own interest, and that they are liable to executions on judgments against him; and a receiver was appointed at the instance of a person in whose favour an annuity was charged on the estate by the present Duke; but the contrary was held respecting a pension granted by act of Parliament for the more honourable support of the dignities of the Duke and his posterity, out of the Post-office revenues, to such persons successively to whom the dignities should descend, and whose receipt should be a sufficient discharge.

But the receiver was afterwards discharged on payment of the original price of the annuity, with interest; it appearing to have been granted for the life of the Duke, in consideration of six years purchase, and very extensive and oppressive powers being given to the annuitant and his trustees.

Where an estate "and all woods" upon it are demised for a term (without express words making the termor dispensable of waste), upon trust by different specified ways and means, including "selling timber," to raise and pay an annuity when in arrear, *quære* whether this gives the annuitant any interest in the timber, or operates as a mere personal agreement?

letters

letters patent, might always go along and be enjoyed with the titles, honours, and dignities aforesaid, it was enacted, that the Duke should stand seised of all the said honour, manor, &c. during his life; with remainder to the Duchess for life; remainder to the heirs male of the body of the Duke; remainder to the daughters of the Duke, successively in tail male, and all others successively, in such manner as the titles were before limited. The 4th section empowered the Duke, and after his death the Duchess, to grant leases of all the estates, except *Blenheim House* and the park of *Woodstock*. By the 5th section it was provided, "That neither the Duke, or the heirs males of his body, nor any of his daughters, or the heirs males of their bodies, or any other person to whom the premises should come or descend by virtue of the limitations aforesaid, should have any power, by fine or recovery, or any other act, assurance, or conveyance in the law, to hinder, bar, or disinherit any the person or persons to or upon whom the said manors, house, lands, tenements, hereditaments, or premises are thereby vested or limited, from holding or enjoying the same according to the limitations before in this act mentioned, other than and except such leases as the said tenants in tail may and are enabled to make by virtue of the statute 32 *Hen. VIII.* and grants of lands or tenements held by copy of court roll according to the customs of the respective manors aforesaid; but all such fines, recoveries, acts, assurances, and conveyances, other than such leases and grants by copy as aforesaid, shall be, and are hereby declared and enacted to be void."

1818.  
  
 DAVIS  
 v.  
 The Duke of  
 MARLBOROUGH.

By another act, 5 *Anne*, c. 4, "For settling on *John*, Duke of *Marlborough* and his posterity, a pension of 5000*l.* per annum for the more honourable support of their dignities in like manner as his honours and dignities, and the honour and manor of *Woodstock* and house of *Blenheim* are already limited and settled;" it was enacted, that in lieu of an annuity or yearly pension of 5000*l.* granted to the Duke and



1819.

DAVIS

v.

The Duke of  
MARLBOROUGH.

the heirs male of his body during the life of the Queen, by letters patent dated the 22d of *December, 1 Anne*, a yearly pension of 5000*l.* payable out of the revenues of the Post-office, should be settled on the Duke during his life, with remainder to the Duchess during her life, with the same remainders over as are contained in the former act relative to the estates. It was provided, that the pension should be paid by the immediate hands of the commissioners, post-masters, &c. by authority of the act, without any further warrant, to the Duke and to all others severally and successively to whom the same should, after his *decease*, come, descend, remain, or belong, by virtue of the act, when, and as they should respectively become entitled to receive the same; and that the payment of the pension should not at any time thereafter be stopped or delayed by any order or direction whatsoever; and that if the commissioners, &c. should refuse or neglect to pay the pension to the Duke, or any other person to whom the same, after his *decease*, should belong by virtue of that act, the Duke, and every other person respectively entitled to receive the same as aforesaid, might sue the commissioners, &c. or any of them, and their securities, heirs, executors, and administrators, by bill, plaint, or action of debt, and might recover judgments and sue out executions thereupon for such sums then due upon the pension, as should be in the hands of the commissioners, &c. at the time when demand should be made of payment of the pension; and that the acquittances of the Duke, and of every other person to whom the pension, after his *death*, should come, descend, or belong by virtue of the act, should be a sufficient voucher and discharge for the payment; and that neither the Duke, or any other person to whom the pension should come, &c. by virtue of the limitations aforesaid, should have power by any act, assurance, or conveyance in the law whatsoever to hinder, bar, or disinherit any the person or persons to whom the pension was, by virtue of the act, limited to come, &c. from holding, receiving, or taking  
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the same, according to the limitations thereof made by the act, but that every such act, assurance, or conveyance, should be void.

1819.  
  
 DAVIS  
 v.  
 The Duke of  
 MARLBOROUGH.

By indenture, dated the 21st of *March*, 1811, reciting the acts of parliament and letters patent, and a lease dated the 21st of *December*, 1808, from the late Duke to the present, of the manor, mansion, and estate, of *White Knights*, in *Berkshire*, for twenty-one years, without impeachment of waste, at the rent of 6s. 8d.; also reciting the will of *Sarah*, Duchess of *Marlborough*, dated the 11th *August*, 1744, devising to her executors, the mansion of *Marlborough House*, and some adjoining ground (to which she was entitled by leases for years from the crown,) in trust for *George*, late Duke of *Marlborough*, for so much of the term, as he should live; and after his decease, in trust for such son of his body, as should first attain the age of twenty-one years, his executors, administrators, and assigns; with directions for procuring renewed leases upon the same trusts; and reciting renewals of the leases since the death of the Duchess, and that the defendant, the present Duke of *Marlborough*, (then Marquis of *Blandford*) as eldest son, and heir apparent of the late Duke, having many years since attained his age of twenty-one years, would, under the acts of Parliament, upon the death of the late Duke, become entitled to the estates therein comprised, and the pension of 5000*l.*; and that he was, under the will and last-mentioned letters patent, absolutely entitled to *Marlborough House*, subject to the life-interest of the late Duke; and that he had agreed with the plaintiff, for the absolute sale to him, of an annuity of 155*l.*, during the term of ninety-nine years, if the defendant the Duke, should so long live, for the price of 999*l.*, and that on the treaty for the sale of the annuity, it was agreed, that all costs and charges of preparing and perfecting the securities for the same, and for inrolling a memorial thereof, should be paid by the Duke; and that in

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1819.  
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 DAVIS  
 v.  
 The Duke of  
 MARLBOROUGH.

pursuance of the agreement, the plaintiff had, in his own person paid 999*l.* in notes of the Bank of *England*, into the defendant's proper hands; and that in pursuance and part performance of the agreement on the part of the Duke, it was intended that he should immediately after the execution of the deed, execute a warrant of attorney to confess judgment against him in the Court of King's Bench, in an action of debt at the plaintiff's suit, for 1998*l.* besides costs of suit; and it was agreed that judgment should be forthwith entered up thereon accordingly: It was witnessed, that in consideration of 999*l.* the defendant, the Duke of *Marlborough* granted to the plaintiff for ninety-nine years, from the day before the day of the date of the deed, if the defendant the Duke should so long live, an annuity of 155*l.* charged upon, and payable after the decease of the late Duke, out of all the honour, manor, mansion, and estates, comprised in the act of 5 *Aune*; and also after the death of the late Duke, to be charged on, and yearly issuing out of the pension of 5000*l.* and also then, and from thenceforth, to be charged upon, and issuing out of the manor, mansion, and estate, of *White Knights*, comprised in the lease of the 21st day of *December*, 1808, and subject to the late Duke's life-interest to be also charged upon *Marlborough* house and its appurtenances; the annuity to be payable quarterly, the first payment to be made on the 21st of *June* then next: And the Duke for himself, his heirs, executors, and administrators, granted and agreed with the plaintiff, that if the annuity, or any part thereof, should be in arrear for twenty-one days after any day of payment, it should be lawful for the plaintiff to enter into, and distrain upon all the premises charged with the annuity, and to sell and dispose of the distresses there found, or otherwise to demean therein, according to law, in like manner as distresses taken for rents reserved by lease; to the intent that the plaintiff might be fully paid and satisfied the annuity so in arrear, and all expences occasioned by the non-payment; and also that in case  
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the annuity should be in arrear by the space of thirty-one days after any of the days of payment, as often as it should so happen, it should (although no legal demand should have been made thereof) be lawful for the plaintiff to enter into, and to hold all the premises charged with the annuity, and to receive the rents and profits thereof, for his own use, until he should therewith, or otherwise, be fully paid the annuity and every part thereof, due at the time of every such entry, and which should afterwards accrue due during his being in possession of the premises, together with all such expences whatsoever which he should sustain by reason of the non-payment thereof; such possession, when taken, to be without impeachment of waste.

The deed contained covenants by the Duke with the plaintiff, for payment of the annuity; that he would, at the plaintiff's request, appear in person, as often as there should be occasion, upon his receiving notice, at any Insurance Office, or to any under-writer in the liberties of *London* or *Westminster*, or send to them notice of his place of abode, and if necessary, certificates of his being living, and of the state of his health, that the plaintiff might insure the defendant's life for any sum he might think proper, not exceeding 999*l.*; that if the defendant should on any occasion leave this kingdom, or do any other act whereby the plaintiff should be put to any extra expence in insuring the defendant's life, he would pay to the plaintiff, all such sums as the plaintiff should sustain, by reason of such extra insurance, and that it should be lawful for the plaintiff to receive all such sums out of the premises charged with the annuity.

The deed contained a demise by the defendant the Duke to the defendant *Eden*, (by the plaintiff's appointment), of the capital messuage called *Blenheim House*, and all the manors and hereditaments comprised in the letters patent of the 5th of *May*, 4 *Anne*; To hold to *Eden*, his executors, &c. from and after the decease of the late Duke, for the term of five hundred years, if the present Duke should so long live;  
and

1819.  
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DAVIS  
v.  
The Duke of  
MARLBOROUGH.

1819.  
  
 DAVIS  
 v.  
 The Duke of  
 MARLBOROUGH.

and the defendant the Duke assigned to *Eden*, the manor of *White Knights*, and all the premises comprised in the lease of the 21st of *December*, 1808, and all woods, underwoods, trees, and plantations, then standing and growing upon the same, and the messuage called *Marlborough House*, with its gardens and appurtenances, subject to the life-interest of the late Duke; To hold the premises comprised in the lease of the 21st day of *December*, 1808, for the residue of the term of twenty-one years, subject to the reserved rent, and to eight other annuities; and to hold *Marlborough House* for the residue of the subsisting term, or any renewed terms therein.

The deed then declared that *Eden* should be possessed of all the premises demised and assigned to him, upon trust, as often as the annuity should be in arrear by the space of fifty days, out of the rents and profits of the premises, or by demising, mortgaging, or selling the same, or any of them, for all or any part of the terms thereby granted and assigned, or to be created by any renewed leases, or by bringing actions against the tenants or occupiers of the premises for recovering the rents, or by felling timber, or cutting underwood, or by sale of fixtures and other things upon, in, and about the premises, or by more than one, or by all those ways and means, or by such other ways and means as to him or them should seem meet, to raise and levy such sums as would be sufficient, or as he or they should think proper or expedient to raise, for paying to the plaintiff the annuity in arrear, and all expences which he and *Eden* might sustain, by reason of the non-payment, or otherwise in the execution of the trusts; and to pay the surplus of the monies so to be raised, to the defendant the Duke of *Marlborough*. It was further declared, that if the annuity should be in arrear for three calendar months, then (whether or not payment should afterwards be made and accepted, of the arrears of the annuity, before any sale or mortgage should be made under the present power,) it should be lawful for *Eden*,  
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and he was thereby authorised and required, in case the same should be directed by the plaintiff, absolutely to sell and dispose of all the manor, mansion-houses, and premises, comprised in the terms of years created by the therein recited lease or letters patent, or any renewed term to be created, and also to sell the timber and underwood growing thereon, and fixtures and other things, in and about the mansion-house called *White Knights*, or to mortgage the same premises, or any part thereof, for any sums whatever; and that it should be lawful for *Eden*, his executors, administrators, or assigns, to enter into, make, and execute, all such covenants, contracts, assignments, deeds, matters, and things, as he should deem reasonable; and that all such contracts, agreements, assignments, deeds, matters, and things, which should be entered into, and executed by *Eden*, his executors, &c. by virtue of this deed, should and might be entered into, executed, &c. either with or without the concurrence of the defendant the Duke of *Marlborough*, and should, whether he should or should not join therein, or assent thereto, be, to all intents and purposes, completely valid and effectual, and bind him and all persons claiming under or in trust for him; and that the receipts of *Eden* should be sufficient discharges for all money payable to him, in execution of the trusts. It was further declared, that *Eden* should stand possessed of the money raised by the means aforesaid, upon trust, in the first place, to redeem the eight former annuities mentioned in the deed, and also to pay all sums due to the persons claiming under two indentures, dated the 23d of *July*, 1806, and the 1st of *June*, 1808; and also to pay and satisfy all annuitants, judgment creditors, and incumbrances, affecting any of the demised premises, and out of the residue, to pay the expences of executing the trusts, and to lay out the surplus in the purchase of stock, or on Government or real securities, and out of the interest and dividends, or the principal if necessary, to pay the plaintiff's annuity of 155*l.*, and all arrears and future payments, and subject thereto,

in

1819.

DAVIS

v.  
The Duke of  
MARLBOROUGH.

1819.

DAVIS  
v.The Duke of  
MARLBOROUGH.

in trust for the Duke. By the same deed, the defendant the present Duke assigned to *Eden* the pension of 5000*l.* to hold from and after the decease of the late Duke, for and during the life of the present Duke, upon trust to secure the annuity of 155*l.* and for that purpose the Duke appointed *Eden* his attorney, to ask, demand, and receive the pension from the commissioners of the Post-office, and to use all the means for the recovery of the same; and the Duke, together with *Eden*, appointed the defendant *Withy* their receiver and attorney to collect and receive the rents and profits of all the estates thereby demised and assigned, with full power for those purposes, upon trust to secure the annuity, and with a provision that the receiver was not to act unless the annuity should be in arrear for six calendar months. The deed also contained covenants by the Duke for the validity of the leases, and that he had power to demise and assign the estates and the pension, and that he would, at his own expence, at the request of *Eden*, execute all further assurances of the estates, and the timber, underwood, and fixtures, during all the residue of the terms which should be unexpired, and also for any further term, not exceeding 500 years, which the Duke might be enabled at any time thereafter, by the death of the late Duke, or otherwise, to grant therein. The deed contained an agreement that the Duke might re-purchase the annuity on giving seven days' notice, paying the arrears, and a proportional part of the annuity up to the time of re-purchasing, and 1087*l.* 15*s.* and all expences occasioned by the non-payment.

The memorial stated that the purchase-money of the annuity was paid to the Duke, out of which he immediately paid all the costs of preparing and perfecting the securities and inrolling the memorial, pursuant to an agreement made upon the treaty for the purchase.

The bill was filed by the annuitant, stating that the annuity was in arrear from the 21st of *September*, 1815; that  
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the late Duke of *Marlborough* died on the 30th of *January*, 1817; that persons to whom the present Duke had confessed judgments, but who, the plaintiff charged, were not *bonâ fide* creditors, had sued out writs of *elegit*, under which they had taken possession of the estates comprised in the plaintiff's security; that by reason of prior incumbrances affecting the estates, and of a term of 500 years, created by an indenture of the 18th of *March*, 1811, for securing an annuity to *John Brown*, the plaintiff was deprived of his legal remedies against the estates; praying an account of the arrears of the plaintiff's annuity; that the amount might be raised, and the future payments secured by sale or mortgage of the premises comprised in the deed of the 21st of *March*, 1811, or by felling timber, cutting underwood, or sale of fixtures, and out of the pension of 5000*l.*; an inquiry into the priorities of the incumbrances; a receiver of the rents and profits of the estates, and of the pension.

1819.  
  
 DAVIS  
 v.  
 The Duke of  
 MARLBOROUGH.

A motion was now made by Mr. *Hart*, on the part of the plaintiff, before answer, for a receiver of the rents and profits of *Blenheim House* and *Woodstock Park*, and of the pension of 5000*l.*

Sir *Samuel Romilly*, Mr. *Bell*, and Mr. *Hampson*, against the motion, objected, first, that no order for a receiver could be made in the absence of the judgment creditors in possession, and who were not parties to the suit; and secondly, that the interest of the Duke in the estates and the pension were, both by the general law, and by the provisions of the acts of Parliament, inalienable. It was the intention of the Queen, and of the legislature, that the estates and the pension should not be separated from the titles, for the latter is expressly recited to be a provision for the more honourable support of the dignities in the posterity of the Duke; and the estates are directed to "go along and be enjoyed with the titles and dignities." If an order is to be made for a receiver as to the pension, it will be in direct opposition to the clause which  
 directs,

1818,  
*January 16.*



1819.

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 DAVIS  
 v.

The Duke of  
 MARLBOROUGH.

directs, that the pension shall "not be stopped or delayed by any order;" and to that which directs that the acquittance of the Duke, and of the persons to whom the pension should, after his decease, belong, by virtue of the act, should be a discharge to the Postmasters. In a case in *Dyer* (a), it is said, that if a man were created Duke, and for the maintenance of his dignity the King granted him 20*l.* as an annuity, he could not grant that to any other, for it is incidental to his dignity. It was decided in *Flarty v. Odium* (b), followed by several other cases (c), that the half-pay of an officer in the army, is not assignable.

Mr. Hart and Mr. Seton, in support of the motion, contended, that the restrictive clauses in the acts of Parliament merely prohibited alienations to the prejudice of the persons in remainder, and did not prevent alienations from being effectual against the persons making them. The cases respecting half-pay have no application. The principle of those cases, as stated by Lord Kenyon in *Flarty v. Odium*, is, that emoluments of this sort are granted for the dignity of the state, and for the decent support of those persons who are engaged in the service of it; that it would therefore be highly impolitic to permit them to be assigned, for persons who are liable to be called out in the service of their country, ought not to be taken from a state of poverty; that an officer has no certain interest in his half-pay, for the King may at any time strike him off the list. It is obvious that none of these reasons can apply to the present case.

*The LORD CHANCELLOR.* Can it be contended that the Lord Chancellor could alienate for his own time the pension which is granted to him out of the revenues of the Post-office, for the express purpose of supporting the dignity of

(a) *Oliver v. Emsonne, Dyer, 2 a.*

(b) 3 T. R. 681.

(c) See also *Barwick v. Reed, 1 H.*

*Bl. 627. Lidderdale v. The Duke of Montrose, 4 T. R. 248. Priddy v. Ross, 3 Meriv. 86.*

his office? Except for the act of Parliament, I apprehend that the Duke's pension would be alienable though granted for past services, but not if it had reference to future. The act gives the Duke a remedy by action against the Postmaster-General, in case of non-payment; could this Court restrain him from releasing such an action? An ordinary grant of land to *A.* for life, is a grant to him and his assigns, though not named, but a different rule applies to a grant under a public warrant; in that case, I apprehend, a person not named in the warrant could not take. One considerable question in this case will be, whether there is any mode by which the grantee or assignee could recover it. This is a subject of much importance, and requires further consideration.

1819.  
  
 DAVIS  
 v.  
 The Duke of  
 MARLBOROUGH.

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The Counsel for the plaintiff having requested the matter to stand over for further argument, it was again spoken to on this day (*a*), when the Lord Chancellor intimated an opinion in favour of the appointment of a receiver as to the estates, but a contrary opinion as to the pension; and his Lordship, on the 5th of *March*, made the following order:—  
 “That it be referred to the Master to appoint a proper person to be a receiver of the rents and profits of the capital messuage called *Blenheim House* and the park called *Woodstock Park*, and all other the estates and premises belonging to the defendant the Duke of *Marlborough*, and comprised in the acts of Parliament in the pleadings mentioned, of 3 and 5 *Anne*, c. 4 and 6; but the appointment of the receiver is not to affect prior incumbrancers upon the estates, who may think proper to take possession of the estates by virtue of their securities; and it is ordered, that the Master do allow the receiver a salary, he first giving security, &c. And the defendant, the Duke of *Marlborough*,

1818,  
 January 29.

(a) In the Reporter's absence.

1818.  
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 DAVIS  
 v.  
 The Duke of  
 MARLBOROUGH.

is to deliver up the possession of the estates to the receiver, but subject as hereinafter mentioned; and the tenants of the estates are to attorn and pay their rents in arrear and growing rents, to such receiver, who is to be at liberty to let and set the estates, with the approbation of the Master, as there shall be occasion, but subject also as hereinafter mentioned, that is to say, that this order is not to affect or extend to the rents and profits of any part of the estate to which any person or persons are entitled under any execution or executions executed, nor to require the tenants of such parts of the estates and premises to attorn, nor to require the Duke to deliver possession of any parts of the said estates and premises which he may hold as tenant under any person or persons claiming such parts by virtue of any execution or executions executed; and it is ordered, that the Master do enquire what incumbrances there are affecting the said estates and premises, and also into the priority thereof respectively:" and all parties were to produce deeds, &c. and to be examined on interrogatories, as the Master should direct: that the receiver should, out of the rents and profits to be received by him, keep down the interest and payments in respect of the incumbrances, according to their priorities, and pay the balances reported due from him into the Bank, with the privity of the Accountant-General, to the credit of the cause, subject to the further order of the Court: "And his Lordship doth not think fit to make any order as to the appointment of a receiver of the pension of 5000*l*."

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The plaintiff afterwards amended his bill by making the judgment creditors parties, and on the 23d of June, 1818, an order was made for discharging so much of the former order as directed that it was not to affect the rents and profits of any part of the estates to which any persons were entitled under any executions executed, nor to require the tenants to attorn, nor the Duke to deliver possession of  
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any part of the premises which he might hold as tenant under any person claiming under any execution executed, and an injunction was granted to restrain the Duke from cutting timber.

1818.  
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DAVIS  
v.  
The Duke of  
MARLBOROUGH.

The Duke, by his answer, submitted whether, according to the true intent of the acts of Parliament, the estates and pension could be charged with the payment of any sums of money; and whether the plaintiff ought to recover his annuity, as the whole consideration was not paid to the Duke, but 87*l.* 11*s.* was paid thereout by him to the plaintiff's solicitor for preparing the securities for the annuity; and that he was willing to pay to the plaintiff his principal actually advanced, with lawful interest; and he submitted whether an account ought not to be taken of the principal money actually paid by the plaintiff to the defendant; and whether credit ought not to be given to the defendant for the money he had paid, and interest, and what had been levied by distress.

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A motion was now made on behalf of the plaintiff, that it might be referred to the Master, to cause a survey to be made, under the direction of the receiver, of such timber and other trees, and also the underwood now standing on the estate at *Blenheim* and *Woodstock Park*, comprised in the acts of Parliament, as is not ornamental timber, or shelter for the mansion of *Blenheim House*, as is fit and proper to be cut, for the purpose of having the same hereafter cut and sold under the direction of the Court, to satisfy to the plaintiff the money due to him pursuant to the power and authority given to him for that purpose by the indenture of the 21st of *March*, 1811.

1819,  
*April 3.*

At the time of this motion being made, the Duke had given notice of a motion to discharge the order for the receiver.

Mr.

1819.  
  
 DAVIS  
 v.  
 The Duke of  
 MARLBOROUGH.

Mr. *Hart* and Mr. *Seton* in support of the motion for a survey of the timber. There is nothing in the statute, 5 *Anne*, c. 3., which has the effect of restraining the Duke from cutting down timber. The clause against alienation in that statute is very similar to the clause in the statute for restraining alienations by women seised of lands *ex provisione viri* (a), and yet, in *Williams v. Williams* (b), your Lordship and the Court of *King's Bench* held, that a woman seised of such an estate was unimpeachable for waste, and might cut timber as her own absolute property. This is not within the rule respecting heirs dealing with their expectancies. The annuity is not to commence at the death of the late Duke, but immediately on the execution of the deed.

Sir *Arthur Piggott*, Mr. *Wray*, and Mr. *Hampson*, contra. The order now asked for is not a necessary consequence of the appointment of a receiver. The deed of *March* 1811, was in effect a mere grant of a post obit annuity, and before the Court gives it validity, it will look at it according to the established rule, that a person dealing with an heir apparent must shew that he has paid a full consideration for that which he has purchased; and in this case the consideration is inadequate; the price was 999*l.* for the purchase of an annuity of 155*l.* to continue during the life of the Duke, and to commence immediately. *Peacock v. Eans* (c), *Gowland v. De Faria* (d). An information has been filed against the Duke, by the Attorney-General, at the relation of persons in remainder, and in that suit an injunction has been granted to restrain the cutting down of timber (e). The right of cutting timber, though incident to the right of an ordinary tenant in tail, does not belong to the peculiar interest of the Duke of *Marlborough* in these estates. He is restrained by the act of Parliament, not only from barring the entail, but

(a) 11 *H. 7. c.* 20.

(b) 15 *Ves.* 419. 12 *East*, 209.

(c) 16 *Ves.* 513.

(d) 17 *Ves.* 20.

(e) See *The Attorney-General v. The Duke of Marlborough*, 3 *Madd.* 498.

according

according to the judgment of the Vice-Chancellor, on the Duke's demurrer to the information (a), from pulling down the mansion of *Blenheim*, and destroying the park. The Court will not permit a receiver nominated in effect by the grantee of an annuity, to lay the axe to the root of whatever timber he may think proper to cut. It is putting the grantee of the annuity into possession of the estates. The effect of all the acts of Parliament taken together is, that the possession of the mansion and park should not be taken from the Duke. When the estate was originally granted, neither the mansion nor the park existed. In consequence of additional services performed by the Duke, the Queen determined to establish a princely residence for him and his posterity. Nothing flowed from the Duke himself. When the second act of Parliament reduced him to the condition of a tenant for life, unimpeachable of waste, with a power of leasing, it was provided that the power should not extend to the mansion and park, evidently because they were intended for his own residence.

1819.  
  
 DAVIS  
 v.  
 The Duke of  
 MARLBOROUGH.

*The LORD CHANCELLOR.* In marriage settlements, it is usual for the estate to be limited to the husband for life, without impeachment of waste, and with a power of leasing all the estates, excepting the mansion-house and park. It has never been contended that the exception of the mansion-house and park has the effect of exempting them from execution, either at law or in equity, during the life of the tenant for life, at the suit of his creditors. The exception undoubtedly prevents him from leasing for any term extending beyond his own life; but it would require different and very special words to prevent his creditors from having execution against the life-estate. I have a strong, and I hope, not an extrajudicial inclination not to interfere under such a deed as this. When I made the order for a receiver, I looked

(a) See 3 *Madd.* 541.

1810.  
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 DAVIS  
 v.  
 The Duke of  
 MARLBOROUGH.

at the case thus; it would be difficult to maintain that a tenant in tail has less power than is given to the tenant for life under the same settlement; and as in an ordinary case, a tenant for life without impeachment of waste is *liable* to have his life-estate laid hold of by his creditors, notwithstanding he can make no lease beyond his life. I did not find either on a perusal of the acts of Parliament, or on subsequent consideration, any reason to think that the circumstance of the power of leasing not being extended to the property in question, could alter the remedy of the creditor.

The question however, at present is, whether, supposing I was right in appointing the receiver, the Court will, in the present stage of the cause, and particularly when the nature of this deed is considered, at once authorise the cutting of timber before a decree. So far as my recollection goes, the age of an heir apparent dealing with his reversion, does not divest the established principle, that he who deals with an heir apparent, takes on him to shew that the transaction is unobjectionable. The price of this annuity was very little more than six years' purchase. All the expences were to be paid by the Duke. He executed a warrant of attorney; and though having been a Peer in his own right, during his father's life, he was privileged as to any execution against his person, this instrument authorised an execution against all his real and personal property in the world, besides what was comprised in the deed. The first payment of the annuity was to be made on the 21st of *June* next after the date of the deed, though the annuity was not to be chargeable on the estate till the death of the late Duke. Then follows a covenant or grant by the Duke, that if the annuity shall be in arrear for twenty-one days, the plaintiff may distrain on all the premises charged with the annuity. This being a covenant without any qualification that the entry and distress should be after the late Duke's death, the present Duke would, I apprehend, be liable to an action upon it for damages,

mages, if no entry could be made under it in the life-time of the late Duke. The following clause, giving the right of entry and perception of rents, is equally unqualified in its terms, unless the Court, (as it undoubtedly would endeavour to do) should by construction restrain the operation of both the clauses, to an entry and distress to be made after the death of the late Duke. Then follow the covenants for payment of the annuity; that he will appear at the Insurance Office, for the purpose of enabling the plaintiff to effect an insurance on his life; and that if he should leave the kingdom, or do any act whereby the plaintiff should be put to any extra expence in insuring the Duke's life, it should be paid by the Duke, and the plaintiff should receive it out of the premises charged with the annuity.

1819.  
  
 DAVIS  
 v.  
 The Duke of  
 MARLBOROUGH.

The demise to *Eden* contains general words, which include woods; but one question will be, whether it is not a demise impeachable for waste; if it is, he cannot touch the woods. It may be a question, whether if a man demise all his lands, woods, &c. for a term, without express words making the lessee punishable for waste, the latter has any title which would enable him to touch the wood. The term is subject to a trust afterwards declared, and the question will be, whether the declaration of trust can amount to more than an agreement that the trustee shall enter to cut down timber, and whether the Court will execute such an agreement before a decree. The clause declaratory of the trusts, on which *Eden* is to hold the premises, requires great attention in a Court of Equity. He is directed to stand possessed of them, subject to several other annuities, upon trusts as large and extensive as I remember to have seen in any annuity deed which has been under my consideration. After the annuity has been in arrear for fifty days, he is "out of the rents and profits, or by demising, mortgaging, or selling the premises, for all or any part of the terms thereby granted and assigned, then subsisting, or which might af-



1819.  
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 DAVIS  
 v.  
 The Duke of  
 MARLBOROUGH.

"terwards be created by any renewed leases, by bringing  
 "actions against the tenants for their rents, by felling timber  
 "or cutting underwood, or by sale of fixtures and other  
 "things, in and about the hereditaments, or by more than  
 "one, or by all those ways and means, or by such other  
 "ways or means as to the trustee should seem meet," to  
 satisfy the arrears and the expences. It is to be considered,  
 whether by virtue of the demise, which is not expressed to  
 be without impeachment of waste, there is any power to cut  
 timber; or whether the power to cut timber being by an  
 agreement contained in a declaration of trust, the right to  
 cut timber rests in any thing more than agreement, or whe-  
 ther it arises out of the interest; whether it is not merely an  
 executory covenant or agreement respecting timber. Ano-  
 ther power of very great extent is given to the trustee. In  
 case of default in payment for three months, he is autho-  
 rized to sell the estates, and the timber and underwood; and  
 the fixtures and other things in the mansion-house of *White  
 Knights*, or to mortgage the estates; and he is empowered  
 to enter into all such covenants, agreements, and assurances,  
 as he shall deem reasonable, which are to be binding on  
 the Duke, whether he shall join in them or not; and he is  
 to stand possessed of the money, for the purpose first of re-  
 deemming the prior annuities, and all sums due to the persons  
 claiming under two deeds of the 23d of *July*, 1806, and  
 the 1st of *June*, 1808, and all the annuitants, judgment  
 creditors, and other incumbrances affecting the premises;  
 afterwards to pay the costs of the trustee, and to invest the  
 residue in the funds, or on real securities, and thereout to  
 discharge the plaintiff's annuity, and all arrears, and subject  
 thereto in trust for the Duke. The result of these very  
 extensive powers is, that if the annuity be in arrear for a  
 particular period, it is competent to *Eden* to sell for the  
 terms of years, to lay out the surplus of the money in the  
 funds, and after payment of the annuity, to be possessed of  
 the residue, in trust for the Duke, giving him a personal  
 interest

interest in the funds, instead of a real interest in the estate, and in the timber. The pension is assigned upon the same trusts; there are covenants for title, and a power of re-purchase. Then follows an appointment of Mr. *Withy* to be receiver and attorney, and he is invested with very extensive powers.

1819.  
  
 DAVIS  
 v.  
 The Duke of  
 MARLBOROUGH.

On this deed, one of the first questions will be, whether, considering who are the parties to it—the nature of its provisions—the condition of the grantor—the provisions for other persons not parties to the deed—that the trusts do not merely authorise the stripping the estates of every thing upon them, but that when an entry is made, it is to be an entry not continuing merely till the arrears are paid, but giving an absolute power of selling the whole property, and of conveying to the purchaser, or of keeping possession subject to all the charges which that possession will create—it is so clear that a decree would be made on bill and answer for carrying the trusts of this deed into execution, that the Court will now give the efficacious relief which the plaintiff is seeking to obtain. This is the view in which I think this case ought now to be considered.

The motion for discharging the receiver ought to be first pronounced upon; for if that motion should succeed, the present will become unnecessary. When I appointed the receiver, I proceeded on this ground. I considered the acts of Parliament, and it did not appear to me that the pension act bore materially on the question. The first Duke of *Marlborough* was once tenant in fee-simple of this property. It was afterwards settled on his posterity, with considerable aids from the public. The first Duke was reduced to the situation of tenant for life, without impeachment of waste. He could therefore *prima facie* have cut down timber. It could not be argued, that what a tenant for life could do, a tenant in tail could not; and on examining the  
 clause

1819.

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DAVIS

v.

The Duke of  
MARLBOROUGH.

clause containing the power of leasing, I considered it thus. In family settlements the estate is usually limited to the parent for life, remainder to the first and other sons, and with powers of leasing of all kinds in the tenant for life, with the exception of the mansion-house and park. Of course if the parent should grant a lease of the excepted parts, if it extended beyond the term of his own life, it would be void; but it has never been held, that he might not charge his life-estate in the mansion-house and park, or that he could protect them against execution, at the suit of a creditor. In the present case, there are executions against the Duke of *Marlborough* affecting his life estate. We then apply by analogy, our appointment of receiver where the estate is equitable, as something resembling an execution. If there be in these acts of Parliament, sufficient to prevent the application of that rule to the present case, I confess it had escaped my attention. I considered the subject thus: If there were two judgment creditors, who had each executed an *elegit* upon one moiety of *Blenheim House*, and if by means of their executions they could get possession, it appeared to me, that if the Court in which the judgments were obtained, thought that *Blenheim House* could be taken under the execution by a legal creditor, there could be no reason why it should not be affected by a proceeding in this Court, at the suit of an equitable creditor; for on that point there can be no difference in principle. There was no doubt that such executions had been executed, and without any application to the Court of King's Bench for setting them aside, it would have been strange that whilst legal creditors could take the estate in execution, equitable creditors could not. I am not determining that legal creditors might take it in execution; but it was admitted, that legal creditors were in possession under executions; and I could see no principle on which, supposing a legal creditor to have that right, it should not equally extend to an equitable creditor.

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A motion

A motion was then made to discharge the receiver. It was supported by Sir *Arthur Piggott*, Mr. *Wray*, and Mr. *Hampson*, and opposed by Mr. *Hart* and Mr. *Seton*.

1819.

DAVIS

v.

The Duke of  
MARLBOROUGH.

April 29.

*The LORD CHANCELLOR.* The motion for a receiver was granted on this simple ground, that the estate was in the possession of judgment creditors, and that although the plaintiff, by himself or his trustees, had acquired an estate which, if it had been legal, might enable him to turn out the judgment creditors, yet being merely equitable, he could not proceed at law; it was therefore the common case of an equitable creditor, with an estate for securing his debt, applying to this Court to have execution given him here; and when such a case is clearly shewn, the Court will appoint a receiver upon motion. I did not think it necessary to give much consideration to the acts of Parliament, for, if the judgment creditors could, by execution obtain possession, it was difficult to say that an equitable creditor should not also, in some manner obtain possession. I did not therefore, on that occasion, nor do I now trouble myself with the questions relative to the nature of the Duke's power of cutting timber, nor whether his estate is liable to the incidents of an ordinary tenant in tail. If it should ultimately be necessary to determine those questions, it would probably be right to submit them in the first instance to a Court of law.

The principle on which it is sought to have the receiver discharged is, that taking *Marlborough House*, *White Knights*, and *Blenheim House*, to be all of the same nature, a receiver should not be appointed before decree. It does not proceed on the same ground as the appointment of a receiver in Dr. *Battie's* case (a); the application there was by the annuitant, and a receiver was appointed. Dr. *Battie* afterwards filed a bill, stating that the annuity deed was bad, on account

(a) *Bosalquet v. Battie*, in Chancery, *Hilary Term*, 1818.

1819.

DAVIS

v.

The Duke of  
MARLBOROUGH.

of defects in the memorial, and by his bill he enabled the Court to say what it could not otherwise have said, that if the memorial was bad, there was a lien on the estate for the purchase-money of the annuity. It has been decided in this Court, that though at law, when an annuity is set aside, the annuitant may, on giving credit for the payments of the annuity which he has received, recover back the price of the annuity; and notwithstanding a party cannot on general principles be relieved in this Court, unless he does what is equitable, yet that when an annuity is set aside in this Court for non-compliance with the act, the annuitant has no lien on the estate for the price of the annuity. Dr. Battie had taken his case out of that general rule by the submission in his bill. In the present case, the Duke of Marlborough, by his answer, has offered to pay back the price, allowing for the payments already made; and if the answer authorises me to fix the purchase-money as an equitable charge on the estate, no objection can arise to fixing it in the hands of the receiver, till the demand submitted to, is satisfied. But if it is not a charge on the estate, the matter to be considered is, whether this deed is so oppressive, that in the first instance the Court will not appoint a receiver. In a clear case a receiver will be appointed; but when there is a doubt whether the grant is within the privilege of an heir expectant, and taking into consideration the comprehensive nature of this deed, and all its provisions, it is questionable whether the deed is not of a nature so oppressive, that aided by the rules and decisions of this Court relative to expectant heirs, the Court will not say, that if there is to be any relief, it must be by decrees. Doubts have been entertained by some of my predecessors, whether the rules with regard to dealings by expectant heirs, were rightly established. Lord Thurlow has held deeds to be oppressive in the case of expectant heirs, which he would not have considered so in the case of individuals in a different situation; and he frequently doubted whether the rule had afforded expectant heirs any relief,

relief, because the parties who dealt with them, usually shielded themselves against the probability of litigation, by making bargains more disadvantageous to the heir, than would have been the case, if the rule had not existed. Lord *Thurlow* however adhered to the doctrine; and it is of great importance that the rules of the Court should not be continually varying. I give no opinion respecting the incidents of the Duke of *Marlborough's* estate, as to the right of cutting timber or otherwise; I confine myself entirely to the question, whether if this was the case of any other heir expectant, the Court would, in the first instance, grant a receiver.

1819.  
  
**DAVIS**  
 v.  
 The Duke of  
**MARLBOROUGH.**

May 27.

Mr. *Wray* and Mr. *Hampson* on this day argued that the deed was void under the annuity act (a), the sum paid by the Duke for the costs of the deed, not being sufficiently stated in the deed, or in the memorial; and they referred to *The Duke of Bolton v. Williams* (b), *Fenner v. Evans* (c), and *Broomhead v. Eyre* (d). When the act requires the consideration to be stated, it is intended that the whole transaction should distinctly appear on the memorial. In the present case, it is impossible to see what was the real consideration. If the statement in this deed and memorial is sufficient, the retainer of any debt may be stated, and it will have the effect of reducing the consideration actually paid, to the lowest possible sum. In *Monys v. Leake* (e), it appears that the consideration money was paid to the grantor, who, being indebted to the person who drew the writings for the expence of those writings; under a previous agreement, immediately paid the amount of the bill; and Lord *Kenyon* held, that there was nothing more unreasonable in this, than in his paying any other debt after receiving the consideration money for the annuity. But this case is distinguishable from *Monys*

(a) 17 Geo. III. c. 56.

(b) 2 Ves. jun. 158.

(c) 1 T. R. 267.

(d) 5 T. R. 597.

(e) 8 T. R. 411.

v. *Leake*,

1819.  
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 DAVIS  
 v.  
 The Duke of  
 MARL-  
 BOROUGH.

v. *Leake*, for, in that case, the debt was an antecedent transaction; but here the debt incurred by the preparing of the deeds, is one which otherwise would have fallen solely on the grantee, the consideration is thereby reduced, and an ineffectual attempt is made to set out the agreement.

Mr. *Hart*, contra, said, that the principle of the decree in *The Duke of Bolton v. Williams*, was, that the purchaser of the annuity was *primâ facie* to pay the expence of the securities, and that if he was not to pay them, the payment by the grantor operated as a deduction from the price. It is not however the general practice that a security is paid for by the person to whom it is made. And he relied on *Monys v. Leake*, as precisely in point with the present case: And the Lord Chancellor was of that opinion, and held the memorial to be sufficient.

JUNE 8.

**THE LORD CHANCELLOR.** The first motion was for the appointment of a receiver, which was refused as to part, and granted as to other part. When the receiver was appointed as to *Blenheim House* and *Woodstock Park*, it was on this ground, that the Duke of *Marlborough* was tenant for life with the ordinary incidents of such an estate. It has now been contended, that the receiver ought to be discharged, instead of being invested with further powers, because this is a deed which a Court of Equity cannot assist, that it would not appoint a receiver even at the hearing; *a fortiori* on an interlocutory motion. The principle on which a receiver is appointed, is this:—Where a bill is filed, stating that the plaintiff has an equitable estate, and consequently cannot recover at law, but it is clear that he may in equity, the Court will appoint a receiver, not disturbing those entitled to previous beneficial interests.

It is clear that this deed would be void, if there were no sufficient memorial within the provisions of the annuity act; it is also clear, according to the rules of this Court, that  
 if

1819.

DAVIS

v.

The Duke of  
MARLBOROUGH.

if it was bad as an annuity deed, it could give no lien whatever to work out the benefit of the consideration money, though that money would be recoverable by action at law. It comes therefore to one of these questions, whether there is a good memorial, and whether the deed is one which can be supported in a Court of Equity. The objections to the memorial have been argued with much ingenuity and ability; my opinion however is, that those objections cannot prevail. Is then the deed such as this Court will act on as an operative deed, considering the Duke as having at the time of its execution, been an heir apparent dealing with his expectancies? It strikes me as being in some points a very oppressive deed; but we still get back to this principle, that even an heir apparent cannot come here to be relieved against an oppressive deed, without tendering the amount of the principal and interest. When therefore the Duke comes here attacking this deed, not as an annuity-deed, but as a deed by an heir apparent, he cannot succeed without offering to pay the amount of the principal and interest. Until therefore that offer is made, and the principal and interest either paid, or tendered and refused, the motion to discharge the receiver is premature. In that way of considering the subject, the money is a lien, though not as an annuity-deed.

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It was stated, that a tender of the purchase-money with interest, had been made and accepted.

August 5.

*The LORD CHANCELLOR.* In this case a question arose, whether the annuity was good within the statute 17 Geo. III. c. 26. It was objected that the annuity was void, on account of a supposed defect in the memorial, but that objection was not sustained. It was further contended, that it was a dealing by the Duke of Marlborough with his expectancies, and that the Court should not have appointed the receiver. On pondering the subject, I thought that if the Court interfered, it must be on its usual principles of paying



1819.  
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 DAVIS  
 v.  
 The Duke of  
 MARLBOROUGH.

paying back the consideration. That money having now been tendered by the Duke and accepted, the order for a receiver must be discharged. If the Duke had tendered the money, and the plaintiff had not accepted what would be due on an account taken, it would be sufficient to authorise me to discharge the receiver, but not enough to enable me to say that there should be an end of the annuity, if the plaintiff chose to prosecute the suit to a hearing (a).

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The following Order was made.

" Upon opening the matter this present day unto the Right Honourable the Lord High Chancellor of Great Britain, by Sir Arthur Piggott, Mr. Wray, and Mr. Hampson, of counsel for the defendant the Duke of Marlborough, it was alledged," [here the substance of the bill was stated, and the order for the receiver] " That since the appointment of the said receiver, the Duke hath put in his answer to the bill, and thereby saith," [here the submissions and offers made by the answer, were stated,] " That it appears by the affidavit of R. Broome, that he called at the house of Mr. Robert Withy the solicitor for the plaintiff in this cause, on the 19th of June, 1819, and tendered to him the sum of 600*l.* in Bank of England notes, in satisfaction of what remained due to the plaintiff, in pursuance of the offer made by the defendant in his answer, which the said R. Broome believes, reckoning interest at five per

(a) See *Berney v. Beak*, 2 Cha. Ca. 136. *Batty v. Lloyd*, 1 Vern. 141. *Nott v. Hill*, 1 Vern. 167. 2 Vern. 27. *Berney v. Pitt*, 2 Vern. 14. *Wiseman v. Beake*, 2 Vern. 121. *Twisleton v. Griffith*, 1 P. W. 310. *Dews v. Brandt*, Sel. Ca. Cha. 7. *Cole v. Gibbons*, 3 P. W. 290. *Curwyn v. Milner*, 3 P. W. 293. *Brooke v. Gally*, 2 Ath. 34. *Freeman v. Bishop*, 2 Ath. 39. S. C. *Barnard Ch. Rep.* 15.

*Barnardiston v. Lingood*, 2 Ath. 133. *The Earl of Chesterfield v. Janssen*, 1 Ath. 301. S. C. 2 Ves. 125. and 1 Wils. 286. *Nicols v. Gould*, 2 Ves. 422. *Gwynn v. Henton*, 1 Bro. C. C. 1. *Henley v. Aze*, 2 Bro. C. C. 17. *Griffith v. Spratley*, 2 Bro. C. C. 179. *Peacock v. Evans*, 16 Ves. 512. *Gowland v. De Faria*, 17 Ves. 20. *Shelley v. Nash*, 3 Madd. 232.

" cent. up to the 21st of June, 1819, amounted to  
 " 572l. 17s. 3d.; and that after some conversation with the  
 " said *R. Broome*, in which the said *R. Broome* insisted that  
 " such tender was made upon the terms before mentioned,  
 " the said *Robert Withy* accepted the said sum of 600l. It  
 " was therefore prayed, that the bill filed in this cause, may  
 " be dismissed, upon such terms as to costs to be taxed by  
 " the Master, as the Court shall direct; or otherwise that  
 " the sum of 600l. paid to and accepted, be returned to the  
 " defendant or his solicitor, with interest thereon from the  
 " time the plaintiff's solicitor received the same, up to the  
 " time of re-payment; whereupon, and upon hearing of  
 " *Mr. Hart*, of counsel for the plaintiff, *Mr. Tinney*, of  
 " counsel for the defendants *William Walker* and *Ann* his  
 " wife, and *Sarah Brown*, and *Mr. Roupell*, of counsel for  
 " the receiver, and the said order of the 5th day of *March*,  
 " 1818, and the said affidavit read, his Lordship doth order,  
 " that the order of the 5th of *March*, 1818, appointing  
 " *E. R. Mores* receiver of the rents and profits of the  
 " estates in question, be discharged."

[Reg. Lib. A. 1818. fol. 1939.]

1819.

DAVIS

v.

The Duke of  
 MARLBOROUGH.

CLARKE v. PRICE.

July 21, 22.

THE bill, filed the 15th of June, 1819, stated that in  
 1814, the defendant *George Price*, Esq. proposed  
 to compose and write Reports of Cases argued and  
 determined in the Court of Exchequer; and the plain-  
 tiffs entered into a treaty with him as to the terms upon  
 which the same should be printed and published; and  
 that on the 27th of April, 1814, the following agreement

The Court  
 cannot speci-  
 fically perform  
 an agreement,  
 whereby *A.*  
 agrees to com-  
 pose and write  
 Reports of  
 Cases deter-  
 mined in a  
 Court of Jus-  
 tice, to be  
 printed and  
 published by a

particular individual for a stipulated remuneration, nor interfere by injunction  
 to restrain the party from permitting reports written by him to be published  
 by another person. The remedy, if any, is at law.

was

1819.

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CLARKE  
v.  
PRICE.

was signed by him :—"Memorandum ; It is agreed between  
" *George Price, Esq. and William Clarke and Sons*, as fol-  
" lows ; Mr. *Price* undertakes to compose and write the  
" Cases in the Court of Exchequer, commencing with *Easter*  
" Term, 1814, and to be published periodically ; the said  
" *William Clarke and Sons* to be at the charge of all ex-  
" pences of paper, printing, and advertising, which expences,  
" when discharged, to divide the profits of the said work  
" equally (that is to say), one moiety to the said *George*  
" *Price*, the other to the said *William Clarke and Sons* ; all  
" accounts to be adjusted at *Christmas* in every year, at the  
" customary trade price and commission : And it is further  
" agreed, that Messrs. *Clarke* shall be at liberty to relinquish  
" the undertaking, should they think it advisable."

The bill further stated, that in pursuance of the agree-  
ment, Mr. *Price* composed and wrote divers Reports of Cases  
argued and determined in the Court of Exchequer, and that  
the plaintiffs printed and published them at their own costs  
and charges, periodically and in parts ; that the first volume,  
consisted of three parts, the first being published in  
*August*, 1814, the second in *May*, 1815, and the third in  
*March*, 1816. That on the 2d of *March*, 1816, a variation  
in the agreement was made between the plaintiffs and  
Mr. *Price*, and that a memorandum thereof was made in  
writing and signed by Mr. *Price*, in the words following :—  
" *March*, 2d, 1816 ; Memorandum of agreement between  
" *George Price and William Clarke and Sons* ; Whereas, by  
" an agreement bearing date the 27th of *April*, 1814,  
" between the above parties, it was there stipulated, that  
" Mr. *Price* should take the Reports in the Exchequer, and  
" Messrs. *Clarke* should print the same, and divide the profits  
" between the respective parties : And whereas the first volume  
" of the Reports in the Court of Exchequer has been printed  
" and published by the said *George Price and William Clarke*  
" *and Sons* : And whereas the said *George Price* is desirous  
" of selling all his copyright and interest in the first volume :  
" In

“ In consideration of which, the said *William Clarke and Sons* agree to give, and the said *George Price* agrees to accept of the sum of 166*l*. And the said *George Price* further agrees to give any further assignment of the copy-right, if required from him by the said *William Clarke and Sons*.” That in pursuance of the second agreement, the plaintiffs duly paid to Mr. *Price* the 166*l*. That in further pursuance of the agreement of the 27th of *April*, 1814, Mr. *Price* continued to write and compose Reports of Cases argued and determined in the Court of Exchequer; and that before the publication of the first part of the second volume, and on or about the 11th of *November*, 1816, a further agreement was made between the plaintiffs and Mr. *Price*, and a memorandum thereof made as follows:—  
 “ *November* 11th, 1816. Memorandum of agreement between *George Price, Esq.* and *William Clarke and Sons*:  
 “ Mr. *Price* agrees to the following terms, for writing and composing the second volume of his Reports in the Exchequer, sale of his copyright, and interest in the said volume; Messrs. *Clarke*, for the considerations above, to pay to Mr. *Price*, within one month after the publication of each part, the sum of 6*l*. 10*s*. for each sheet of sixteen pages royal octavo, and in the same proportion for any less quantity than a sheet; Mr. *Price* to be allowed the sum of 2*l*. on each part for corrections; all above that sum to be paid by Mr. *Price*, and deducted out of the payment for each part; Mr. *Price* to give a further assignment, if required, at Messrs. *Clarke's* expence.”

1819.

CLARKE  
v.  
PRICE.

The bill further stated, that in pursuance of the agreements, Mr. *Price* composed and wrote a second volume of Reports of Cases argued and determined in the Court of Exchequer, and which the plaintiffs, at their expence, printed and published in four parts, the first part on the 20th of *January*, 1817, the second, on the 23d of *April*, 1817 the third on the 1st of *June*, and the fourth on the 13th of *September*, 1817; and that the plaintiffs duly paid  
 the

1819.  
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 CLARKE  
 v.  
 PRICE.

the sums of money due to Mr. Price for the copyright of the second volume, according to the three memorandums of agreement. That in June, 1817, the plaintiffs and Mr. Price agreed to make a further variation in the terms of the agreement of the 27th of April, 1814, and on the 19th of June, 1817, the following memorandum was signed:—  
 “ London, June 19th, 1817. Memorandum; Mr. Price  
 “ agrees with Messrs. Clarke to receive for his interest in  
 “ the agreement for the Exchequer Reports, dated 27th of  
 “ April, 1814, commencing at the third volume, the sum of  
 “ 7*l.* per sheet, and 3*l.* per part for corrections; all above  
 “ that sum to be paid by Mr. Price, and if under 3*l.* the  
 “ difference to be paid to Mr. Price until the sale shall  
 “ exceed a thousand, but not to apply to any reprints above  
 “ that number of the parts already published or to be;  
 “ Mr. Price agrees to give any further assignment of the  
 “ copyright and future interest to Messrs. Clarke, at their  
 “ expence.”

The bill further stated, that in pursuance of the agreements of the 27th of April, 1814, and the 19th of June, 1817, Mr. Price wrote and composed, and the plaintiffs printed and published, at their expence, the third volume, consisting of four parts, and also two parts of the fourth volume, at the times specified in the bill, and that they had paid to Mr. Price the sums which by the agreements were due to him in respect of the third volume, and also divers sums on account of the fourth volume.

The bill further stated, that Mr. Price had made some contract with the other defendants Brooke and Sweet, by which he had bound himself to write and compose new volumes of Reports of Cases argued and determined in the Court of Exchequer, and in the Exchequer Chamber, in order and to the intent that the same might be printed and published by Brooke and Sweet; and the plaintiffs insisted that they were entitled to have an assignment duly made to  
 them,

them, of all the copyright in such of the reports as he had written and composed, and to be the printers and publishers and to have an assignment made to them of the copyright of all such of the said reports as he shall hereafter write and compose, upon making to him such payments as he is entitled to by virtue of the agreements of the 27th of *April*, 1814, and the 19th of *June*, 1817.

1819.  
  
 CLAREN  
 v.  
 PRICE.

The bill prayed, that the defendant, Mr. *Price* might be decreed specifically to perform the said agreements expressed in the said memorandum, by permitting the plaintiffs to print and publish the reports of cases in the Court of Exchequer, so long as he should continue to compose and write the same, upon the terms agreed upon in the said memorandums respectively, and delivering to the plaintiffs the manuscripts of said reports for that purpose, and by duly making and executing to the plaintiffs, an assignment of the copyright of such parts of the said work as had been published, and should thereafter be written and composed, the plaintiffs being ready to pay to him such sums of money as should be justly due to him; also praying an injunction to restrain Mr. *Price* from printing or publishing, or employing the other defendants, or any other person or persons than the plaintiffs, to print and publish the fifth or any subsequent volume or part of the same work, which Mr. *Price* should thereafter compose and write, and to restrain the other defendants, *Brooke* and *Sweet*, from printing and publishing the said work so written and composed, or to be written and composed, or any part thereof.

The answers submitted, that on the true construction of the agreements, Mr. *Price* was not bound to employ the plaintiffs as the publishers of all future reports to be written by him; that the plaintiffs were informed in *October* 1818, of the contract between Mr. *Price* and the other defendants; that on the 1st of *April*, 1819, the work was advertised, as being about to be published, and that the de-

1819.

CLARKE  
v.  
PRICE.

defendants had now printed a considerable part of the fifth volume, and had thereby incurred great expence; and that the plaintiffs having suffered such expence to be incurred, were not entitled to the assistance of the Court.

An injunction having been obtained *ex parte*, on the filing of the bill, and on affidavit, a motion was now made to dissolve it.

Mr. Wetherell, Mr. J. Wilson, and Mr. Price, for the defendants Price and Sweet. Mr. Heald and Mr. Ching for the defendant Brooke, in support of the motion. The first agreement constitutes a partnership without limitation as to time, and consequently dissoluble by either party. It is expressed to be determinable at the option of the plaintiffs. The second agreement is a sale of Mr. Price's copyright in the first volume. It is evident, from the circumstance of their entering into a new agreement for every volume, that no permanent agreement existed. The third agreement proceeds on a supposition that there was no subsisting contract applicable to the second volume. So far therefore, there is no question respecting Mr. Price's obligation to continue the publication with the plaintiffs. If there be any difficulty it arises on the agreement of the 19th of June, 1817. The true construction of that agreement is, that it applies solely to the third volume. The only words supposed to apply to any thing future, (and which are said to be inserted in that agreement, though the plaintiffs' and the defendants' copies do not agree in that respect), may refer to the unpublished parts of the third volume. This agreement either refers only to the third volume, or it revives the first agreement. If it merely refers to the third volume, there is an end of the question. If it revives the first agreement, it does not help the plaintiffs' case, for neither in the first nor the fourth, is any period fixed for the continuance of the publication. It is either to continue until one of the parties shall think proper to determine it, as in cases of partnership

partnership without limitation of time (a), or it is to be determinable at the will of the plaintiffs alone under the clause in the first agreement. In either view of the case, it is an agreement of which this Court will not decree the specific performance, as your Lordship held in *Hercy v. Birch* (b). The right to compel a specific performance must be mutual; and it is clear that Mr. Price could not have had a decree for a specific performance against the plaintiffs. It is as incidental to specific performance alone that the injunction can be continued.

1819.

CLARK  
v.  
PRICE.

An agreement that one person shall be the publisher of all the works of another is much too undefined for the Court to act upon. The case of *Morris v. Colman* (c), which was referred to when the injunction was moved for, has no resemblance to the present case. The defendant *Colman* was engaged with several other persons as partners in the *Haymarket Theatre*, and the articles of partnership contained a clause restraining him from writing dramatic pieces for any other theatre; and he having acted in opposition to that stipulation, your Lordship granted the injunction. But if the right of the plaintiffs to equitable relief had originally been clear, they have forfeited it by their own laches. They were long ago informed by public advertisement, and also personally, of Mr. Price's intention to transfer the publication to the other defendants: they did not apply to this Court for several months, during which great expence has been incurred, and a considerable portion of the work printed.

Mr. *Shadwell*, for the plaintiffs, admitted, that the language of the contracts could not give the plaintiffs the right of compelling Mr. Price to furnish them with notes of cases for publication, if he chose altogether to discontinue the publication of the reports; but he contended, that if notes of

(a) *Peacock v. Peacock*, 16 Ves. 49. (b) 9 Ves. 357. (c) 18 Ves. 437.



1819.

CLARKE  
&  
PRICE.

cases were written by Mr. Price for publication, he was by the terms of the agreement bound to have them published by the intervention of the plaintiffs.

*The LORD CHANCELLOR.*—The case of *Morris v. Colman* is essentially different from the present. In that case, *Morris, Colman*, and other persons, were engaged in a partnership in the *Haymarket Theatre*, which was to have continuance for a very long period, as long indeed as the theatre should exist. *Colman* had entered into an agreement which I was very unwilling to enforce; not that he would write for the *Haymarket Theatre*, but that he would not write for any other theatre. It appeared to me, that the Court could enforce that agreement by restraining him from writing for any other theatre. The Court could not compel him to write for the *Haymarket Theatre*; but it did the only thing in its power; it induced him indirectly to do one thing, by prohibiting him from doing another. There was an express covenant on his part contained in the articles of partnership. But the terms of the prayer of this bill do not solve the difficulty; for if this contract is one which the Court will not carry into execution, the Court cannot indirectly enforce it, by restraining Mr. Price from doing some other act. This is an agreement which expressly provides that Mr. Price shall write and compose reports of cases to be published by the plaintiffs. In *Morris v. Colman*, there was a decree directing the partnership to be carried on; it could not be put an end to; and it was the duty of the parties to interfere. But I have no jurisdiction to compel Mr. Price to write reports for the plaintiffs. I cannot, as in the other case, say, that I will induce him to write for the plaintiffs, by preventing him from writing for any other person, for that is not the nature of the agreement. The only means of enforcing the execution of this agreement would be to make an order compelling Mr. Price to write reports for the plaintiffs; which I have not the means of doing. If there be any remedy in this case,

it

it is at law. If I cannot compel Mr. *Price* to remain in the Court of Exchequer for the purpose of taking notes, I can do nothing. I cannot indirectly, and for the purpose of compelling him to perform the agreement, compel him to do something which is merely incidental to the agreement. It is also quite clear, that there is no mutuality in this agreement. I am of opinion that I have no jurisdiction in this case.

1819.  
CLARKE  
v.  
PRICE.

Injunction dissolved.

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The bill was afterwards dismissed, with costs, for want of prosecution.

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1819.



July 28.

SMITH v. STAFFORD.

Where a canal is situate in the provinces of *Canterbury* and *York*, but the office for transacting the business of the canal is in the former province, it is sufficient if the will of a shareholder be proved in the Prerogative Court of *Canterbury*.

ON a motion for payment into Court of the purchase-money of certain Canal shares, the only question was, whether the will of a person to whom the shares had belonged, and which had already been proved in the Prerogative Court of *Canterbury*, should also be proved in *that of York*; the Canal in question being situate in both provinces, but the office at which all the documents and accounts respecting it were kept, and all the transfers registered, being in *London*. The shares were personal estate.

*Mr. Heald* in support of the motion, contended, that the probate already obtained, was sufficient.

*Mr. Wilbraham*, contra, compared the shares in question to those of the *New River*, fines of which must be levied in all the counties through which the river passes (a). This Canal being in different provinces, there should be a probate in each.

*The LORD CHANCELLOR.* My opinion is, that a probate in the Province of *Canterbury* is sufficient. If, however, the parties do not agree to be bound by this opinion, there must be a reference to the Master to settle a proper conveyance.

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An order was made for payment of the purchase-money into Court.

(a) 2 P. W. 27, note.

1819.

JACKSON v. SEDGWICK.

August 4.

**M**R. *Roupell* moved on behalf of the defendants, that the plaintiffs might produce and leave with their Clerk in Court, certain drafts or sketches of accounts referred to in the bill, for the inspection of the defendants (a). In the case of *The Princess of Wales v. The Earl of Liverpool* (b), it was decided, that it is competent to a defendant to apply to the Court for a production of papers by a plaintiff. The plaintiffs mention these sketches in their bill, and it is to be inferred that they are in their possession. The defendants had put in their answer.

A plaintiff stated certain papers in his bill, but did not allege that they were in his possession; the defendant, after answer, moved for the production of the papers, and the motion was refused, with costs.

Mr. *Hart*, contra, was stopped by the Court.

*The LORD CHANCELLOR.* This case is very different from the case referred to. The order there made was, that the defendants should not be called on for an answer until a limited time after the production of the documents, on an affidavit that the defendants could not answer the bill satisfactorily till they had seen the papers. This is an application founded on the mere circumstance of the plaintiffs' having mentioned the papers in their bill, for the bill does not state that they are in their possession. The general rule of the Court is, that a defendant cannot have an order for production by a plaintiff. In the case which has been cited, the general rule gave way, on the authority of the *Practical Register*, one of the oldest and most respectable books on the practice of this Court. It appeared to me, on the authority of that work, that if a defendant swears that he can-

(a) See the case stated, Vol. I. 297. (b) Vol. I. 113.

1819.

JACKSON

v.

SEDGWICK.

not safely put in his answer without a production of papers, which the plaintiff has stated in his bill, the Court would give him time to answer till there should be a production of the papers. But suppose the plaintiff has stated the papers in his bill, and the defendant puts in his answer without calling for an inspection of them, he cannot afterwards require it. I cannot order a person to produce papers without its being shewn that those papers are in his possession. The defendants must file a cross bill. The Court would be placed in a singular situation if, after having committed the plaintiff for not producing the papers, it should afterwards appear that they were not in their possession.

Motion refused, with costs.

END OF THE FIRST PART.















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